2004 Legal Update

CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

2004
LEGAL UPDATE

TELECOURSE REFERENCE GUIDE

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For additional information contact:

California Commission on Peace Officer Standards and Training
TRAINING PROGRAM SERVICES BUREAU - CPTN
1601 Alhambra Boulevard
Sacramento, CA 95816
(800) 441-7678

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MISCELLANEOUS

INTRODUCTION

This telecourse reference guide addresses important case decisions and statutory law changes implemented during the legislative year. In an effort to expand this program to a statewide law enforcement audience, satellite transmission of the legislative update began in 1990. This telecourse program is now distributed via direct-mail DVD to all Certified Telecourse Presenters in the California POST program. The telecourse is segmented and designed for use during roll call briefings.

This telecourse reference guide is designed to be used in conjunction with the training course. Materials are arranged to follow along the program sequence. Blank space has been provided to write notes, record information not included in the text, or to jot down questions.

Editorial questions regarding this program should be directed to Jody Buna, Senior Law Enforcement Consultant, Training Program Services Bureau at the Commission on POST, (916) 227-4896.

CHANGES IN

GENERAL LAW ENFORCEMENT

LAWS

CRIME: ASSAULT: ARMED FORCES

Penal Code Sections 241.8 & 243.10 (Added)
Chapter 138 / Assembly Bill 187

SUMMARY: These new laws increase the penalty for assault or battery against a member of the United States Armed Forces if the motivation for the crime was because of the victim's membership in the Armed Forces.

HIGHLIGHTS:

- Existing law defines an assault as an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another and provides that it is punishable by a fine not exceeding $1,000, or imprisonment in a county jail for a period not exceeding 6 months, or by both that fine and imprisonment.
- This law would provide that any person who commits an assault against a member of the United States Armed Forces, as specified, would be punished by a fine not to exceed $2,000, or imprisonment in a county jail for a period not to exceed one year, or by both that imprisonment and fine.
- Existing law defines a battery as any willful and unlawful use of force or violence upon the person of another and provides that it is punishable by a fine not exceeding $2,000, or imprisonment in a county jail for a period not exceeding 6 months, or by both that fine and imprisonment.
- This law would provide that any person who commits a battery against a member of the United States Armed Forces, as specified, would be punished by a fine not to exceed $2,000, imprisonment in a county jail for a period not to exceed one year, or by both that fine and imprisonment.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Officers should be aware that the crime is more severe upon the showing that it was bias motivated and include that information if it is present.

NOTES:

CRIME: PROFESSIONAL SPORTING EVENTS

Penal Code Section 243.83 (Added)
Chapter 818 / Assembly Bill 245

SUMMARY: This new law makes it an infraction to interfere with play at a professional sporting event by throwing anything or entering upon the field or court being used.

HIGHLIGHTS:

- Existing law makes it a crime to commit a battery against a sports official, as specified.
- This law would make it unlawful for any person attending a professional sporting event to throw any object on or across the court or field of play with the intent to interfere with play or distract a player ; or enter upon the court or field of play without permission from an authorized person during the sporting event.
- This law would also provide that its provisions shall apply to attendees, but not to players or sports officials.
- This law would also require the owner of the facility in which a professional sporting event is to be held to provide a specified notice regarding the bill's provisions.
- This law would also provide that a violation of the provisions prohibiting throwing objects on or entering the field of play is an infraction punishable by a fine not exceeding $250 and that failure of the owner to post the specified notice is not a defense to a violation.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: A separate offense now exists for disrupting a professional sporting event.

NOTES:

CRIME: BATTERY: CODE ENFORCEMENT OFFICERS

Penal Code Sections 241 & 243
Chapter 274 / Senate Bill 919

SUMMARY: Code enforcement officers are added to the list of professions for which an enhanced sentence can be received for assault or battery.

HIGHLIGHTS:

- Under existing law, while assault is punishable by a fine not exceeding $1,000, or by imprisonment in a county jail not exceeding 6 months, or by both the fine and imprisonment, when an assault is committed against specified officers or other persons the offense is a misdemeanor punishable by a fine not exceeding $2,000, or by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.

- This law would include a code enforcement officer, as defined, in the list of specified officers or persons to which these provisions apply.

- Under existing law, while battery is generally a misdemeanor punishable by county jail time not exceeding 6 months or a specified fine, or both, the battery of specified officers or other persons is a misdemeanor punishable by county jail time not exceeding one year and by a specified fine or by both.

- This law would include a code enforcement officer, as defined, in the list of specified officers or other persons to which the above provisions apply.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Assault or battery on a Code Enforcement Officer now qualifies the suspect for an enhanced sentence.

NOTES:

LOCAL ORDINANCES: PENALTIES FOR VIOLATION

Government Code Sections 25132 & 36900
Chapter 60 / Senate Bill 567

SUMMARY: Penalties for violating local ordinances, which are now from $100 to $500, are doubled for second, third and subsequent violations to $200 to $1,000.

HIGHLIGHTS:

- Existing law provides with respect to city and county ordinances that the violation of an ordinance is a misdemeanor unless the ordinance makes it an infraction. A violation determined to be an infraction is punishable by a fine not exceeding $100, by a fine not exceeding $200 for a 2nd violation of the same ordinance within one year, and by a fine not exceeding $500 for each additional violation of the same ordinance within one year.

- This bill would specifically provide that the violations of local building and safety codes determined to be infractions are punishable by a fine not exceeding $100 for a first violation, a fine not exceeding $500 for a second violation of the same ordinance within one year, and a fine not exceeding $1,000 for each additional violation of the same ordinance within one year of the first violation.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law has a minimal impact on law enforcement.

NOTES:

PUBLIC SAFETY OFFICERS: OFF-DUTY EMPLOYMENT

Penal Code Section 70
Chapter 104 / Assembly Bill 359

SUMMARY: Peace officers are allowed to have an off-duty job unless specifically prohibited by written policy. If an officer is denied permission to engage in off-duty employment they must be notified in writing as to the reason for the denial. The fact that an officer or deputy is engaged in off-duty employment cannot be interpreted as the acceptance of a reward or gratuity.

HIGHLIGHTS:

- Existing law provides that every executive or ministerial officer, employee, or appointee of the State of California, or any county or city therein, or any political subdivision thereof, who knowingly asks, receives, or agrees to receive any emolument, gratuity, or reward, or any promise thereof excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor.

- Existing law exempts from that offense, certain employment by a peace officer as a security guard or patrolman while off duty, as specified.

- This law would additionally exempt from the scope of that offense, other employment by a peace officer while off duty, and would, subject to exceptions, provide that a peace officer may not be prohibited from engaging in other employment while off duty, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Officers are allowed to engage in off-duty employment of their choosing unless prohibited by department policy.

NOTES:

PEACE OFFICERS: PORT POLICE OFFICERS

Penal Code Section 830.1
Chapter 47 / Assembly Bill 354

SUMMARY: Los Angeles City Harbor Police Officers are added to other officers with 830.1 authority which extends to any place in the state.

HIGHLIGHTS:

- Existing law defines specified powers, rights, duties, and training requirements for peace officers and provides that any harbor or port police regularly employed and paid in that capacity by a county, city, or district is a peace officer, if the primary duty of the peace officer is the enforcement of the law in or about the properties owned, operated, or administered by the harbor or port or when performing necessary duties with respect to patrons, employees, and properties of the harbor or port.

- Under existing law, these peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

- This law would change the category for the port police officers of the Harbor Department of the City of Los Angeles to a category that specifies that these persons are peace officers whose authority extends to any place in the state, as specified, and that doesn't limit the carrying of firearms.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This change affects Los Angeles City Harbor Police Officers.

NOTES:

PEACE OFFICER TRAINING: SWAT

Penal Code Section 13514.1 (Added)
Chapter 624 / Assembly Bill 991

SUMMARY: P.O.S.T. must now establish minimum training recommendations and guidelines for SWAT teams. These would be available for all law enforcement agencies that conduct SWAT operations.

HIGHLIGHTS:

- Existing provisions of law require the Commission on Peace Officer Standards and Training to provide various courses of training for peace officers.
- This law would require the Commission on Peace Officer Standards and Training to establish standardized training recommendations and guidelines for Special Weapons and Tactics (SWAT) teams, as specified, that would be available for use by law enforcement agencies that conduct SWAT operations.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: SWAT officers will have minimum recommended guidelines for training, fitness, supervision and practical issues available effective July 1, 2005.

NOTES:

EMPLOYER-EMPLOYEE RELATIONS: LAW ENFORCEMENT OFFICERS AND FIREFIGHTERS

Code of Civil Procedure Sections 1299.7 & 1299.9
Chapter 877 / Senate Bill 440

SUMMARY: Arbitration panel's decisions over economic issues between employee groups and public entities are no longer binding on the government entities unless specified in their charter. The City Council or Board of Supervisors may overturn the arbitrators decision by unanimous vote.

HIGHLIGHTS:

- Existing law provides that if an impasse has been declared after the representatives of an employing county, city, city and county, special district, or other political subdivision of the state and representatives of firefighters or law enforcement officers have exhausted their mutual efforts to reach agreement over economic issues as defined within the scope of arbitration and the parties are unable to agree to the appointment of a mediator or the mediator is unable to effect a settlement, the employee organization may request, by written notification to the employer, that their differences be submitted to an arbitration panel, as specified.

- Existing law provides that after specified procedures are followed the arbitration panel's decision is binding upon the parties.

- Existing law also provides that these provisions do not apply to an employer that is a city, county, or city and county governed by a charter that was amended prior to January 1, 2001, to incorporate a procedure requiring the submission of all unresolved disputes relating to wages, hours, and other terms and conditions of employment within the scope of arbitration to an impartial and neutral 3rd party for final and binding determination. The California Supreme Court has held that law unconstitutional in County of Riverside v. Superior Court.

- This law would instead provide that the governing body of the employer agency may, by unanimous vote, reject the decision of the arbitration panel, except as specifically provided to the contrary in a city, county, or city and county charter with respect to the rejection of an arbitration award.

- This law would also provide that these provisions do not apply to a city, county, or city and county employer governed by a charter for that respective entity that was amended prior to January 1, 2004, to incorporate such a procedure.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Arbitration is no longer binding with respect to economic contract issues unless a city or county charter specifies that it is.

NOTES:

MANDATED REPORTERS: CUSTODY OFFICERS

Penal Code Section 11165.7
Chapter 12 / Senate Bill 316

SUMMARY: Custody officers are added to the list of mandated reporters of child abuse or neglect.

HIGHLIGHTS:

- Existing law, the Child Abuse and Neglect Reporting Act (CANRA), requires a mandated reporter, as defined, to report whenever he or she, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. Failure to report an incident is a crime punishable by imprisonment in a county jail for a period of 6 months, a fine of up to $1,000, or by both that imprisonment and fine.

- This law would add custodial officers, as defined, to the list of individuals who are mandated reporters.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Custody officers, as described in 831.5 of the Penal Code (a public officer, not a peace officer), must now report child abuse or neglect that they are made aware of.

NOTES:

LAW ENFORCEMENT OFFICERS: SPECIAL DEATH BENEFITS

Government Code Sections 21541, 31781.1 & 31787
Chapter 840 / Assembly Bill 933

SUMMARY: Special death benefits are extended to the spouse and children of officers. A child is now defined as a natural or adopted child of the deceased member, or a stepchild living or domiciled with the deceased member at the time of his or her death.

HIGHLIGHTS:

- Existing law prescribes special death benefits that are payable to the surviving spouse and children of a patrol, state peace officer/firefighter, state safety, state industrial, or local safety member of the Public Employees' Retirement System whose death was industrial.
- Existing law also prescribes the optional death allowance for the survivors of a member of a county retirement system, as specified, who dies as a result of a non-service-connected disability.
- This law would define a child, for purposes of eligibility for and calculation of those benefits, to mean a natural or adopted child of the deceased member, or a stepchild living or domiciled with the deceased member at the time of his or her death, as specified.
- The provisions of the law would apply retroactively to the survivors of a deceased member who dies or is killed in the line of duty on or after January 1, 2001.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Children of peace officers to receive special death benefits are now clearly defined.

NOTES:

SEXUAL ASSAULT VICTIMS: TOXICOLOGY TESTING

Penal Code Section 13823.11
Chapter 535 / Assembly Bill 506

SUMMARY: Urine and blood samples may be obtained from a victim, with their consent, to determine if drugs or alcohol were used in connection with the sexual assault. The evidence collected is not admissible in any civil or criminal action against the victim.

HIGHLIGHTS:

- Existing law sets forth minimum standards for the examination and treatment of victims of sexual assault, including the collection of physical evidence.
- This law would provide, in addition and subject to the victim's refusal, that where indicated by the history of the contact, the victim's urine and blood sample would be collected for toxicology purposes, to determine if drugs or alcohol were used in connection with the assault.
- The law would also provide that the toxicology results obtained would be inadmissible in any criminal or civil action or proceeding against any victim and would be confidential except for purposes of prosecuting or defending the crime or crimes necessitating the examination.
- This law would also require that victims be informed of specified information regarding the testing.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: if a sexual assault victim voluntarily submits to a blood and/or urine test that information is confidential and the results of the test may not be used against the victim in court.

NOTES:

SEXUAL ASSAULT VICTIMS: DNA BILL OF RIGHTS

Penal Code Section 680 (Added)
Chapter 537 / Assembly Bill 898

SUMMARY: The new ''Sexual Assault Victims' DNA Bill of Rights'' requires law enforcement agencies to obtain a DNA profile of evidence obtained and check the Department of Justice Convicted Offender DNA Data Base for a match. The victim must be notified in writing, including a reason given, if this procedure is not followed. Victims must also be informed in writing if the agency intends to destroy any sexual assault evidence prior to the expiration of the statute of limitations.

HIGHLIGHTS:

- Existing law specifies various rights for crime victims.
- This law would establish the ''Sexual Assault Victims' DNA Bill of Rights.'' This bill would authorize a law enforcement agency investigating certain felony sex offenses to, upon the request of the victim, and subject to the commitment of resources, inform the victim whether or not a DNA profile was obtained from the testing of the rape kit evidence or other crime scene evidence from their case, whether that information had been entered into the Department of Justice Data Bank of case evidence, and whether or not there is a match between the DNA profile developed from the rape kit evidence or other crime scene evidence and a DNA profile contained in the Department of Justice Convicted Offender DNA Data Base, as specified.
- The law would also provide that the victim would be given written notification by the law enforcement agency if the law enforcement agency elects not to perform DNA testing of the rape kit evidence or other crime scene evidence, or intends to destroy or dispose of the rape kit evidence or other crime scene evidence prior to the expiration of the statute of limitations as specified.
- The law would further provide that the victim's sole remedy for the failure of a law enforcement agency to comply with these provisions would be to file a writ of mandamus. (an extraordinary writ commanding an official to perform a ministerial act that the law recognizes as an absolute duty and not a matter for the official's discretion)

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement agencies, subject to the commitment of resources, must do DNA testing and comparison against the D.O.J. Convicted Offender DNA Data Base on sexual assault evidence or inform the victim the reason why it was not done. And any sexual assault evidence collected may not be destroyed until the statute of limitations has run.

NOTES:

CRIME: PELVIC EXAMINATIONS

Business and Professions Code Section 2281 (Added)
Chapter 644 / Assembly Bill 663

SUMMARY: It is now a misdemeanor for a physician, surgeon or medical student to perform a pelvic examination on an unconscious patient unless consent was given or the examination is required for diagnostic purposes.

HIGHLIGHTS:

- Existing law, the Medical Practice Act, establishes training and education requirements for issuance of a physician's and surgeon's certificate. The act also prohibits certain practices and makes the violation of those provisions by any person a misdemeanor.
- This law would prohibit a physician and surgeon and a medical student from performing a pelvic examination on an anesthetized or unconscious patient unless the patient has given informed consent to the pelvic examination, the pelvic examination is within the specified scope of care, or, if the patient is unconscious, the pelvic examination is required for diagnostic purposes.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now unlawful for a physician, surgeon or medical student to perform a pelvic exam on an unconsenting patient unless it must be performed for diagnostic purposes related to her care.

NOTES:

CRIMINAL PROCEDURE: DISCOVERY

Penal Code Section 1054.10
Chapter 238 / Senate Bill 877

SUMMARY: Current law prohibits the defense from sharing confidential information such as addresses and phone numbers of victims and witnesses it receives from the District Attorney per discovery with the defendant. This law adds child pornography to the information that cannot be shared with the defendant.

HIGHLIGHTS:

- Existing law, added by initiative statute, controls discovery obligations in criminal cases. In particular, existing law requires the prosecuting attorney and the attorney for the defendant to disclose to each other specified materials and information in his or her possession, or known to be in the possession of investigators, including, among other things, relevant real evidence seized or obtained as a part of the investigation of the offenses charged. This initiative measure also forbids attorneys, their employees, and others appointed by the court to disclose the addresses or telephone numbers of victims and witnesses in a criminal case to a defendant, the defendant's family, or any other person except as required to assist in the preparation of the defendant's case.

- This bill would forbid the disclosure of copies of child pornography evidence by an attorney to a defendant, members of a defendant's family, or anyone else, except for the attorney's employees or court appointees if required for preparation of the case. The attorney would be required to inform persons provided this material that further dissemination of the material would be forbidden.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now prohibited for the defense to share child pornography with a defendant.

NOTES:

SEX OFFENDERS: REGISTRATION

Penal Code Section 290
Chapter 540 / Assembly Bill 879

SUMMARY: This law requires convicted child pornographers to register as sex offenders.

HIGHLIGHTS:

- Existing law requires certain persons convicted of any specified sexual offense to register with local law enforcement officials, as specified.
- This law would add to the list of persons who are required to register as sex offenders persons who have been convicted of knowingly sending or causing to be sent into the state for sale or distribution, or possessing, preparing, or producing child pornography, as defined.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Persons convicted of child pornography crimes must register as sex offenders.

NOTES:

SEX OFFENDERS: REGISTRATION

Penal Code Section 290.85
Chapter 245 / Assembly Bill 1098

SUMMARY: The same requirements of 290 registration that apply to parolees now also apply to probationers. The parole or probation officer must now inform the sex offender of their registration responsibilities. And, law enforcement agencies must now provide any registrant with written proof they registered.

HIGHLIGHTS:

- Existing law requires any person released on probation or parole for commission of a sexual offense the commission of which requires him or her to register as a sex offender to read and sign a form stating that the duty to register has been explained to him or her, as specified.
- Existing law requires every parolee who is required to register as a sex offender to provide proof of registration to his or her parole agent within 6 working days of release on parole and proof of any revision or annual update to his or her registration information to his or her parole agent at their next scheduled supervision appointment.
- This law would require, in addition, that every person released on probation who is required to register as a sex offender provide his or her probation officer proof of their registration within 6 working days of his or her release, as specified.
- This law would also require every person who is released on probation or parole and who is required to register as a sex offender to provide proof of any revision or annual update for so long as that person is required to be under the supervision of a parole officer.
- This law would also require a probation officer or parole agent who supervises a registered sex offender to inform him or her of their duties under this section, as specified. This bill would also require a law enforcement agency that registers an individual subject to these provisions to provide him or her proof of their registration, as defined.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement agencies must provide sex registrants written proof they registered that then must be delivered to their parole, or now, probation officer.

NOTES:

SEX OFFENDERS: CD-ROM AND CAMPUS NOTIFICATION

Penal Code Sections 290, 290.01, 290.4 & 290.45 (Added)
Chapter 634 / Assembly Bill 1313

SUMMARY: This law now allows campus police departments to release sex registrant information on all sex offenders, not just high risk, to the their campus community. It also extends the law dealing with the collection and release of information until 2007.

HIGHLIGHTS:

- Existing state law provides that campus law enforcement may advise the public of the presence of high-risk sex offenders in its community, as specified.
- Existing federal law has been interpreted to require campus law enforcement to advise the public of the presence of all sex offenders on campus.
- This law would revise state law to provide that campus law enforcement, or, if the campus has no police department, local law enforcement, may release to members of the campus community information regarding the presence of sex offenders on campus, as specified.
- This law would require a member of the campus community to sign a specified statement before an agency would release offender information to him or her upon his or her request and would require the agency to maintain the statement in a file in the agency's office for at least 5 years.
- This law would require an agency disseminating printed information pursuant to its provisions to maintain records of the means and dates of dissemination for a minimum of 5 years.
- This law would define campus police department and campus community.
- This law would provide that the Department of Justice may develop a training program for the disclosure of the information.
- This law would extend the expiration of the current provisions related to releasing sex offender information to January 1, 2007.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Campus police officers are mandated by federal law to release all their sex offender information to their community. Their community is the campus itself and areas off campus that are occupied by or frequented by students.

NOTES:

TRESPASS: HUMAN CONSUMPTION ANIMALS

Penal Code Section 602
Chapter 805 / Senate Bill 993

SUMMARY: This law adds the same provisions of 602 P.C. dealing with oysters and shellfish to lands or buildings where cattle, goats, pigs, sheep, fowl, or any other animal is being raised, bred, fed, or held for the purpose of food for human consumption. Signs prohibiting trespassing must be posted.

HIGHLIGHTS:

- Existing law makes it a misdemeanor to willfully commit a trespass by engaging in specified acts, including, entering upon any lands owned by any other person whereon oysters or other shellfish are planted or growing; or injuring, gathering, or carrying away any oysters or other shellfish planted, growing, or on any of those lands, whether covered by water or not, without the license of the owner or legal occupant; or destroying or removing, or causing to be removed or destroyed, any stakes, marks, fences, or signs intended to designate the boundaries and limits of any of those lands.

- This law would make it a trespass to enter upon lands or buildings owned by any other person without the license of the owner or legal occupant, where signs forbidding trespass are displayed, and whereon cattle, goats, pigs, sheep, fowl, or any other animal is being raised, bred, fed, or held for the purpose of food for human consumption; or to injure, gather, or carry away any animal being housed on any of those lands, without the license of the owner or legal occupant; or to damage, destroy, or remove, or cause to be removed, damaged or destroyed, any stakes, marks, fences, or signs intended to designate the boundaries and limits of any of those lands.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now illegal to trespass on lands or buildings where cattle, goats, pigs, sheep, fowl, or any other animal is being raised, bred, fed, or held for the purpose of food for human consumption.

NOTES:

TRESPASS: AIRPORT

Penal Code Section 602
Chapter 361 / Assembly Bill 1263

SUMMARY: This law makes it unlawful to enter of reenter the sterile area of an airport after intentionally avoiding submission to the screening and inspection of one's person and accessible property in accordance with the procedures being applied to control access to that area. If the trespass disrupts travel for other passengers the penalty is increased from 6 months to 1 year in the county jail.

HIGHLIGHTS:

- Existing law makes it unlawful for persons to engage in certain acts of trespass. In particular, existing law makes it unlawful for a person to knowingly enter upon any airport operations area, as defined, if the area has been posted with notices restricting access, as provided.

- Existing law also makes it a crime to possess specified weapons, replica weapons, parts of weapons, and ammunition within a sterile area of an airport, as defined, to which access is controlled by screening of persons and property, except as provided.

- This law would make it a trespass to enter or reenter the sterile area of an airport after intentionally avoiding submission to the screening and inspection of one's person and accessible property in accordance with the procedures being applied to control access to that area. That trespass would be punishable as a misdemeanor with imprisonment of not more than 6 months in a county jail unless a violation is responsible for the evacuation of an airport terminal, is responsible in any part for delays or cancellations of scheduled flights, and the sterile area is posted with reasonable notice that the trespass may be prosecuted, in which case it would be punishable as a misdemeanor with not more than 1 year imprisonment in a county jail.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now illegal to avoid screening areas at airports and enter the "sterile" area. The area must be posted limiting access to only those passengers who have been screened or by other authorized personnel.

NOTES:

TRESPASS: MATERNITY WARDS

Penal Code Section 602
Chapter 355 / Assembly Bill 936

SUMMARY: This law makes it unlawful to trespass in a neonatal unit, maternity ward, or birthing center located in a hospital or clinic without lawful business .

HIGHLIGHTS:

- Existing law makes it unlawful for persons to engage in certain acts of trespass, and punishes most trespasses as misdemeanors.

- This law would make it a trespass to knowingly enter or remain in a neonatal unit, maternity ward, or birthing center located in a hospital or clinic without lawful business to pursue therein, if the area has been posted so as to give reasonable notice, as specified, restricting access to those with lawful business to pursue therein and the surrounding circumstances would indicate to a reasonable person that he or she has no lawful business to pursue therein. Violation of this provision would be punishable as an infraction by a fine of not more than $100, except that an offender refusing to leave when instructed could be punished by imprisonment in a county jail for a period not to exceed one year, a fine not to exceed $1,000, or both. A second or subsequent violation would be punishable by imprisonment in a county jail for a period not to exceed one year, a fine not to exceed $2,000, or both.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now a violation of law for a person to trespass at a hospital or clinic in areas designated primarily for newborn babies. The area must be posted as such and this offense is an infraction unless the person fails to leave when instructed is guilty of a misdemeanor.

NOTES:

MINORS: TEMPORARY CUSTODY

Welfare and Institutions Code Section 305.5 (Renumbered 305.6)
Chapter 568 / Assembly Bill 962

SUMMARY: This law dictates the procedure to follow at a hospital when a newborn or her birth mother have tested positive for drugs and an adoption is pending. The birth parents have new rights concerning an advisement about the proceedings as outlined on a Health Facility Minor Release Report. Officers are prohibited from taking a minor into custody under these circumstances when the adoptive parents present proof of either adoption or foster parent status with an adoption pending.

HIGHLIGHTS:

- Existing law authorizes a peace officer to take into temporary custody a minor who is in a hospital if the release of the minor to a prospective adoptive parent poses an immediate danger to the minor's health or safety.

- However, existing law prohibits a peace officer from taking into custody, without a warrant, a newborn child who is in a hospital, who tested positive for illegal drugs or whose birth mother tested positive for illegal drugs, who is the subject of an adoption petition and an adoption placement agreement, and whose release to the prospective adoptive parents does not pose an immediate danger to him or her.

- Existing law requires the prospective adoptive parents or their representative to provide a copy of the filed petition for adoption and the signed adoption placement agreement to the local child protective services agency or to the peace officer who is at the hospital to take the minor into temporary custody.
- This law would, as a condition prohibiting a peace officer from taking a minor into temporary custody, without a warrant, when the minor is a newborn who tested positive for illegal drugs or whose birth mother tested positive for illegal drugs, additionally require that the prospective adoptive parents or their representative provide a copy of a signed Health Facility Minor Release Report, a copy of an agency relinquishment signed by the placing birth parent or birth parents, and specified documentation. In the latter circumstances, the law would impose certain conditions on the prospective adoptive parents or their representative.

- The law would also prohibit a peace officer from taking into temporary custody, without a warrant, a minor who is in a hospital, who is a newborn who tested positive for illegal drugs or whose birth mother tested positive for illegal drugs, and who is the subject of a petition for adoption, if the prospective adoptive parent or parents of the minor have been licensed to act as a foster parent or parents of the minor and other conditions are met.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law cleans up existing legislation that allows adoptive parents to take custody of newborns if the newborn or their birth mother tested positive for drugs, the birth parents have agreed to an adoption, the adoptive parents can provide written documentation of their status as foster parents with an adoption pending or an adoption placement agreement or Health Facility Minor Release Report.

NOTES:

ABANDONED NEWBORNS: SAFE-SURRENDER

Health and Safety Code Section 1255.7; Penal Code Section 271.5
Chapter 150 / Senate Bill 139

SUMMARY: This law expands the location where a newborn may be surrendered within 72 hours of birth to avoid prosecution related to child abandonment and neglect. Counties can now designate safe-surrender sites other than hospitals that are posted with a sign having a statewide logo designating the site as such.

HIGHLIGHTS:

- Existing law provides that a parent or other person having lawful custody of a minor child 72 hours old or younger who surrenders physical custody of the child to a designated employee on duty at a hospital emergency room or other location designated by a county board of supervisors by resolution may not be prosecuted for specified crimes related to child abandonment and neglect.

- Existing law requires the person designated pursuant to these provisions to take physical custody of the child in accordance with certain requirements if the parent or other person having lawful custody of the child voluntarily surrenders physical custody to that person.

- This law would revise these provisions to eliminate the requirement that the child be surrendered to a designated employee on duty in the emergency room of a hospital or location designated by the board of supervisors.

- The law would instead allow the surrender of the child to a safe-surrender site, as defined, designated for this purpose by a county board of supervisors and at designated hospitals.

- The law would also provide that certain information pertaining to the individual surrendering the child is confidential and would require safe-surrender sites to post signs, utilizing a statewide logo that has been adopted by the State Department of Social Services.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Minors born within 72 hours may be dropped off by a parent or other person with lawful custody to safe surrender sites as designated by county board of supervisors. These will be in addition to hospitals that presently accept such minors.

NOTES:

CRIME: KIDNAPPING

Penal Code Section 207
Chapter 23 / Senate Bill 450

SUMMARY: This law merely states that the only force necessary to substantiate that element when it involves an unresisting infant or child is whatever force is actually required to carry them away a substantial distance.

HIGHLIGHTS:

- Existing law provides that every person who forcibly, or by any other means of instilling fear, steals, takes, holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

- Existing law also provides for other definitions of kidnapping, some requiring that the victim be taken or carried away by force or forcibly. As regards to an unresisting infant or child, the California Supreme Court, in the case of In re Michelle D. (2002) 29 Cal.4th 600, has defined the element of force for purposes of kidnapping as that amount of force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent.

- This law would codify that holding, and would state that it does not constitute change in existing law.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The force necessary to prove that element in kidnapping is greatly reduced when it involves an unresisting infant or child.

NOTES:

CRIME: ELDER ABUSE

Penal Code Section 368
Chapter 543 / Assembly Bill 1131

SUMMARY: This law increases the penalty for forgery, fraud, or identity theft when it's committed against an elder or dependent adult.

HIGHLIGHTS:

- Existing law provides that it is a crime, punishable, based upon the value of the property taken, by imprisonment in a county jail, a fine not exceeding $1,000, or both that imprisonment and fine, or by imprisonment in a county jail for a period not exceeding one year or imprisonment in the state prison for 2, 3, or 4 years, for a person who is the caretaker of an elder or dependent adult or for a person who is not a caretaker who knew or should have known that their victim was an elder or dependent adult, to commit theft or embezzlement with respect to the property of an elder or dependent adult.

- This law would expand these provisions to include forgery, fraud, or identity theft committed against an elder or dependent adult.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Additional crimes of forgery, fraud, or identity theft are added to 368 P.C. when committed against an elder or dependent adult.

NOTES:

PROTECTIVE ORDERS: DOMESTIC VIOLENCE

Penal Code Section 1270.1
Chapter 30 / Assembly Bill 1488

SUMMARY: This law requires the court to hold a hearing prior to reducing the bail for a suspect in custody for violating a domestic violence protective order if they made threats to kill or harm, engaged in violence against, or visited the residence or workplace of, the protected party.

HIGHLIGHTS:

- Existing law provides that before any person who has been arrested for commission of certain specified crimes is released on bail in an amount other than that specified in the schedule of bail for the offense or, is released on his or her own recognizance, a hearing shall be held at which the court shall consider certain enumerated factors including the potential danger the detained person poses to other persons. If the judge or magistrate sets bail in an amount other than that specified in the schedule of bail for the offense, he or she shall state his or her reasons for doing so in the record.

- This law would add violation of a domestic violence protective order if the detained person made threats to kill or harm, engaged in violence against, or visited the residence or workplace of, the protected party to the list of crimes, the commission of which require that a hearing must be held before release on bail in an amount other than that specified in the schedule of bail for the offense or on one's own recognizance.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This has a minimal effect on law enforcement.

NOTES:

PROTECTION ORDERS: FOREIGN

Family Code Sections 6401 & 6402
Chapter 134 / Senate Bill 399

SUMMARY: This law adds antistalking laws to the definition of a protection order therefore authorizing California law enforcement to enforce it. And it authorizes California law enforcement to enforce foreign protection orders dealing with support by removing that exception from the law.

HIGHLIGHTS:

- Existing law, the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, authorizes the enforcement of a valid foreign protection order in a tribunal of this state under certain conditions.
- Existing law also requires a law enforcement officer of this state to enforce a foreign protection order upon determining that there is probable cause to believe that a valid foreign protection order exists and has been violated.
- This law would expand the definition of protection order by including orders issued under antistalking laws.
- This law would remove provisions prohibiting enforcement of a provision of a foreign protection order respecting support and make a related statement of legislative findings and declarations.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement officers may enforce valid foreign protective orders dealing with antistalking and support violations.

NOTES:

IDENTITY THEFT: DISCLOSING ACCOUNT INFORMATION

Penal Code Section 530.8
Chapter 90 / Assembly Bill 1772

SUMMARY: This law adds accounts regarding mail receiving or forwarding services and office or desk space rental services to those services listed in 530.8 PC that a victim is entitled to receive information from.

HIGHLIGHTS:

- Existing law provides that if a person discovers that an unauthorized person has applied for certain services or opened certain accounts, the person is entitled to receive the identifying information that was used by the unauthorized person to apply for or open the account or service and a record of transactions and charges associated with the account or service upon presentation of a copy of a police report and identifying information.

- This law would add applications and accounts regarding mail receiving or forwarding services and office or desk space rental services to the applications and accounts covered by these provisions.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement may now get identity theft information from accounts regarding mail receiving or forwarding services and office or desk space rental services on behalf of victims when handling identity theft cases.

NOTES:

IDENTITY THEFT: IDENTIFICATION

Penal Code Sections 853.5 & 853.6 Vehicle Code Sections 40303, 40305, 40305.5, 40500, and 40504
Chapter 467 / Senate Bill 752

SUMMARY: This law allows a victim whose identity was used, without their knowledge, in the issuance of a traffic citation, to have a comparison print rolled at the local police department so the court can have it compared in order to clear the victim. Local law enforcement agencies may charge their actual expenses to provide this service.

HIGHLIGHTS:

- Under existing law, in any case in which a person is arrested for an offense declared to be an infraction or a misdemeanor, including a violation of any city or county ordinance or a violation of the Vehicle Code, the person may be released pursuant to specified procedures that include presenting to a peace officer satisfactory identification or signing a promise or notice to appear.

- Existing law also authorizes a peace officer to obtain a right thumbprint, or a left thumbprint or fingerprint if the person has a missing or disfigured right thumb, on a promise to appear from the person arrested for an infraction if that person does not provide satisfactory evidence of identity, or when the person is arrested for a misdemeanor and he or she has no satisfactory identification.

- Existing law provides that a person reasonably believing he or she is a victim of identity theft may petition the court for a factual finding of innocence, which shall be granted if there is no reasonable cause to believe that person committed the associated offense, as specified.

- This law would provide that a person contesting a charge by claiming under penalty of perjury not to be the person issued a notice to appear under the circumstances described above may choose to submit a print to the issuing court through his or her local law enforcement agency for comparison with the one placed on the notice to appear.

- This law would authorize a local law enforcement agency providing this service to charge the requester no more than the actual costs.

- The law would also specify procedures by which the court would determine the result of the contest, including providing for a finding of factual innocence under certain circumstances and for a referral of that finding to the Department of Motor Vehicles for specified purposes. It would specify that the citation or notice to appear may be held by the prosecuting attorney or issuing agency for future adjudication should the arrestee who received the citation or notice to appear be found.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Victims of identity theft, that find a suspect used their identity when receiving a traffic citation, may pay a local law enforcement agency to “roll” a

comparison print for the court in order to clear their name. Law enforcement may also see an increase in identity theft cases as courts uncover the fact it occurred and turn the information over to the local agency or sheriff department.

NOTES:

IDENTITY THEFT: SEARCH WARRANTS

Penal Code Section 1524
Chapter 137 / Assembly Bill 1773

SUMMARY: This law allows a magistrate to issue a search warrant for property in another county when the property or things to be seized consist of any item or constitute any evidence that tends to show a violation of specified identity theft crimes. The person whose identity was taken resides in the same county as the issuing court.

HIGHLIGHTS:

- Existing law authorizes a court or magistrate to issue a warrant for the search of a place and the seizure of property or things identified in the warrant where there is probable cause to believe that specified grounds exist. Although statute does not directly address the issue, case law permits a magistrate to issue a warrant for a person or property in another county under certain circumstances.

- This law would provide that, in addition to any other circumstances permitting a magistrate to issue a warrant for a person or property in another county, when the property or things to be seized consist of any item or constitute any evidence that tends to show a violation of specified identity theft crimes, a magistrate may issue a warrant to search a person or property located in another county if the person whose identifying information was taken or used resides in that other county.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Local courts may now issue out of county search warrants when the victim of identity theft is a resident of the issuing county.

NOTES:

IDENTITY THEFT: LIMITATIONS PERIOD

Penal Code Section 803
Chapter 73 / Assembly Bill 1105

SUMMARY: The statute of limitations for 115 PC (Filing false or forged instruments with a public office), and 530.5 PC (Unlawful use of another persons identity), do not begin to run until the crime is discovered.

HIGHLIGHTS:

- Under existing law, any person who willfully obtains personal identifying information, as defined, of another person, and uses that information for any unlawful purpose, and any person who, with the intent to defraud, acquires, transfers, or retains possession of the personal identifying information of another person, is guilty of a crime.
- Existing law also makes it a crime to knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office in this state, as specified.
- Existing law requires that, except as specified, prosecution for an offense punishable by imprisonment in the state prison be commenced within 3 years of the commission of the offense.
- Existing law also provides that, with respect to offenses involving fraud or certain other elements, the limitation of time does not begin to run until the discovery of the offense, and specifies crimes that fall into this category.
- This law would provide, in addition, that the limitations period for the crimes involving the unlawful use of personal identifying information and procuring or offering a false or forged instrument for record does not begin to run until discovery of the offense.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The statute of limitations for 115 and 530.5 don't begin to run until the crimes are discovered.

NOTES:

PRACTICE OF LAW OFFENSES: LIMITATIONS PERIOD

Penal Code Section 803
Chapter 152 / Senate Bill 337

SUMMARY: This law extends the statute of limitations relating to unlawful practice of law to commence only when the offense has been, or could reasonably have been, discovered.

HIGHLIGHTS:

- Under existing law, there are various specified limitations of time after which a criminal complaint or indictment may not be filed against a defendant.
- Existing statutes permit those limitations of time to be extended or waived for various specified reasons. In particular, for specified crimes and categories of crime, certain provisions delay the commencement of the time permitted for filing until the offense has been discovered, or could reasonably have been discovered.
- This law would add violations of provisions relating to unlawful practice of law to those for which the commencement of the applicable limitation of time commences only when the offense has been, or could reasonably have been, discovered.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The unlawful practice of law has no statute of limitations until the violation has been, or could reasonably have been, discovered.

NOTES:

PROCEDURE: ATTORNEY - CLIENT CONFIDENCES

Business and Professions Code Section 6068 / Evidence Code Section 956.5
Chapter 765 / Assembly Bill 1101

SUMMARY: This law allows an attorney, but does not require them, to reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

HIGHLIGHTS:

- Existing law, the State Bar Act, provides for the licensing and regulation of attorneys by the State Bar of California.
- Existing law imposes various duties on an attorney, including the duty to maintain the confidences and preserve the secrets of his or her client at every peril to himself or herself.
- This law would authorize an attorney to reveal confidential information to the extent that the attorney reasonably believes disclosure is necessary to prevent a criminal act likely to result in death or substantial bodily harm to an individual.
- Existing law, with certain exceptions, makes privileged any confidential communication between a lawyer and a client.
- Existing law provides an exception to the privilege if the lawyer reasonably believes that disclosure of a confidential communication is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.
- This law would instead make the exception applicable if the lawyer reasonably believes disclosure is necessary to prevent any criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual.
- The provisions of the bill would become operative on July 1, 2004.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Attorneys may report that their client is likely to engage in an act that is likely to result in the death of, or substantial bodily harm to, an individual.

NOTES:

NONVIOLENT DRUG POSSESSION OFFENSE: PERSONAL USE

Penal Code Section 1210
Chapter 155 / Senate Bill 762

SUMMARY: This law clarifies the definition of nonviolent drug possession from "the unlawful possession, use, or transportation for personal use", to "the unlawful personal use, possession for personal use, or transportation for personal use".

HIGHLIGHTS:

- Existing law categorizes controlled substances into Schedules I to V, inclusive, and places the greatest restrictions and penalties on those contained in Schedule I.
- Existing law, added by initiative statute, generally provides that, effective July 1, 2001, (a) a person convicted of a nonviolent drug possession offense shall receive probation with completion of a drug treatment program as a condition of that probation, and (b) a person's parole may not be suspended or revoked for committing a nonviolent drug possession offense or for violating a drug-related condition of parole, but an additional condition of parole for those offenses or violations shall be the completion of a drug treatment program.
- Existing law defines the term ''nonviolent drug possession offense'' to mean the unlawful possession, use, or transportation for personal use of any controlled substance classified in Schedules I to V, inclusive.
- This law would clarify the definition of ''nonviolent drug possession offense'' by providing that the term means the unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance classified in Schedules I to V, inclusive.'

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law could change some sentencing provisions from treatment to time in custody. Check with your local District Attorney.

NOTES:

DRUG DIVERSION: SEALED RECORDS

Penal Code Section 851.90 (Added)
Chapter 792 / Senate Bill 599

SUMMARY: This law allows a defendant who has been diverted to a drug diversion program as a result of a charge of 11350, 11357, 11364, 11365, 11377, or 11550 of the Health and Safety Code to have their record sealed upon the successful completion of the program. Although the defendant may legally claim the arrest did not occur in matters of employment, that does not apply if application is being made for a position in law enforcement or upon re-arrest for a similar offense. DOJ will still maintain a record of the original charge and reveal that fact as authorized by law.

HIGHLIGHTS:

- Existing law authorizes the sealing of certain records in connection with the dismissal of charges, as specified.
- This bill would provide that whenever a person is diverted pursuant to a drug diversion program administered by a superior court or is admitted to a deferred entry of judgment program for specified drug offenders, the person successfully completes the program, and it appears to the judge presiding at the hearing where the diverted charges are dismissed that the interests of justice would be served by sealing the records of the arresting agency and related court files and records with respect to the diverted person, the judge may order those records and files to be sealed, as specified.
- The law would provide that the Department of Justice shall continue to be able to maintain and disseminate any records or documents received or maintained by it, as authorized by law.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement applicants must still reveal diverted arrests for drug violations as the information will still be available form DOJ for applicant purposes.

NOTES:

DRUGS: MEDICAL MARIJUANA

Health and Safety Code Sections 11362.7, 11362.71, 11362.715, 11362.72, 11362.735, 11362.74, 11362.745, 11362.755, 11362.76, 11362.765, 11362.77, 11362.775, 11362.78, 11362.785, 11362.795, 11362.795, 11362.8, 11362.81, 11362.82 & 11362.83 (Added)
Chapter 875 / Senate Bill 420

SUMMARY: This law requires, through the State Department of Health Services, every county, either through it's health department or other department as designated, to issue identification cards to authorized medical marijuana patients under 11362.5 H&S. Caregivers of the patients may also obtain a card and have the same prosecution exemptions as the patients. Fraud or unlawful use of a card is a misdemeanor. Individuals on bail, parole, probation, in custody or incarcerated may also obtain identification cards and use medical marijuana. The patient or caregiver may possess up to eight ounces of dried marijuana, and six mature or 12 immature plants unless their doctor feels more is warranted. (This only applies to female cannabis plants). Medical marijuana patients are **not exempt** from prosecution any place where smoking is prohibited by law, or within 1,000 feet of the grounds of a school, recreation center, or youth center, (unless the medical use occurs within a residence), on a school bus, while in a motor vehicle that is being operated, or while operating a boat.

HIGHLIGHTS:

- Existing law, the Compassionate Use Act of 1996, prohibits any physician from being punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes. The act prohibits the provisions of law making unlawful the possession or cultivation of marijuana from applying to a patient, or to a patient's primary care giver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

- This law would require the State Department of Health Services to establish and maintain a voluntary program for the issuance of identification cards to qualified patients and would establish procedures under which a qualified patient with an identification card may use marijuana for medical purposes.

- This law would authorize the Attorney General to set forth and clarify details concerning possession and cultivation limits, and other regulations, as specified.

- The law would also authorize the Attorney General to recommend modifications to the possession or cultivation limits set forth in the bill.

- The law would require the Attorney General to develop and adopt guidelines to ensure the security and nondiversion of marijuana grown for medical use, as specified.

NOTE: The State of California Attorney General has issued an opinion that "hashish" is included within the definition of marijuana.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Although every medical marijuana patient is not

required to obtain an ID card this law should make it easier to identify those that actually are authorized. The State Department of Health will maintain a 24 hour hotline to verify the authenticity of the cards.

NOTES:

ALCOHOLIC BEVERAGES: SIGNAGE OR FLYERS

Business and Professions Code Section 25664
Chapter 771 / Assembly Bill 1398

SUMMARY: This law prohibits any signage or flyers that advertise establishments that serve alcoholic beverages to individuals under the age of 21 years, if one of the establishment's principal business activities is the selling of alcoholic beverages and the advertisement expressly states that the jurisdiction in which the establishment is located has a legal drinking age of under 21 years, or that individuals under the age of 21 years may patronize the establishment.

HIGHLIGHTS:

- The Alcoholic Beverage Control Act contains various provisions regulating the application for, the issuance of, the suspension of, and the conditions imposed upon, alcoholic beverage licenses by the Department of Alcoholic Beverage Control. That act also prohibits, subject to a criminal penalty, the use, in any advertisement of alcoholic beverages, of any subject matter, language, or slogan addressed to and intended to encourage minors to drink the alcoholic beverages.

- This bill would additionally prohibit any signage or flyers that advertise establishments that serve alcoholic beverages to individuals under the age of 21 years, if one of the establishment's principal business activities is the selling of alcoholic beverages and the advertisement expressly states that the jurisdiction in which the establishment is located has a legal drinking age of under 21 years, or that individuals under the age of 21 years may patronize the establishment.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Establishments that are in the business to serve alcoholic beverages may not advertise through signs or flyers that they will serve minors or allow minors to patronize their business.

NOTES:

SMOKING: PUBLIC BUILDINGS

Government Code Sections 7596, 7597, & 7598 (Added); 19994.31 & 19994.32 (Repealed); 19994.30 & 19994.33 (Amended)
Chapter 342 / Assembly Bill 846

SUMMARY: It is unlawful to smoke within 20 feet of the entrance, exit or operating window, of a building belonging to a State, County, City or Community College entity. State employees may also not smoke in a State vehicle.

HIGHLIGHTS:

- Existing law prohibits any state employee or member of the public from smoking a tobacco product inside a state-owned or state-occupied building, or a state-leased and state-occupied building, as defined, or within 5 feet of the main exit or entrance of these buildings, or in a passenger vehicle owned by the state.

- This bill would instead prohibit smoking inside a public building, as defined, and within 20 feet of a main exit, entrance, or operable window of a public building. It would also provide that these provisions would not preempt the authority of any county, city, city and county, California Community College campus, campus of the California State University, or campus of the University of California to adopt and enforce additional smoking and tobacco control ordinances, regulations, or policies that are more restrictive than the standards required by this bill.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now a crime to smoke within 20 feet of the entrance, exit or operating window of a "Public Building", or in a State vehicle.

NOTES:

WIRELESS TELEPHONES: DESTRUCTION

Penal Code Section 591.5
Chapter 143 / Assembly Bill 836

SUMMARY: Just as it is unlawful to disrupt "wired" phone service when done with the intent to prevent the device to summon or notify law enforcement, this law also applies to any disruption in wireless phone service.

HIGHLIGHTS:

- Existing law provides that a person who unlawfully and maliciously takes down, removes, injures, or obstructs any telephone line is guilty of a misdemeanor or a felony.
- This bill would provide that a person who unlawfully and maliciously removes, injures, destroys, or damages any wireless communication device with the intent to prevent the use of the device to summon assistance or notify law enforcement or any public safety agency of a crime is guilty of a misdemeanor.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now a crime to maliciously remove, injure, destroy, or damage any wireless communication device with the intent to prevent the use of the device to summon assistance or notify law enforcement.

NOTES:

ELECTIONS: POLLING PLACES

Elections Code Section 18541
Chapter 390 / Assembly Bill 915

SUMMARY: This law makes it unlawful to record a voter entering or exiting a polling place by photographing, videotaping, or other recording within 100 feet of a polling place if the purpose is to dissuade them from voting.

HIGHLIGHTS:

- Existing law prohibits certain activities within 100 feet of a polling place with the intent of dissuading another person from voting. Violation of this provision is a misdemeanor or felony. Conspiracy to violate this provision is a felony.
- This law would add to those prohibited activities photographing, videotaping, or otherwise recording a voter entering or exiting a polling place.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is a wobbler to try and dissuade a person from voting by photographing, videotaping, or otherwise recording a voter entering or exiting a polling place.

NOTES:

COMMISSIONS AND COMMITTEES: RECORD AND FILM INDUSTRY

Government Code Sections 14998.2 & 14998.4 (Amended) 14998.11 & 14998.12 (Added), 15363.60, 15363.61, 15363.62, 15363.63, 15363.64, & 15363.65 (Added)
Penal Code Section 13848.8 (Added)
Chapter 662 / Assembly Bill 1277

SUMMARY: This law requires the High Technology Crime Advisory Committee to establish the goal of apprehending and prosecuting criminal organizations, networks, and groups of individuals engaged in the crimes of misappropriation of recorded music for commercial advantage or private financial gain; the transportation of articles containing unauthorized recordings of live performances; the creation and distribution of pirated sound recordings or audiovisual works; and the failure to disclose the origin of a recording or audiovisual work.

HIGHLIGHTS:

- Existing law creates the High Technology Crime Advisory Committee, which was established for the purpose of formulating a comprehensive written strategy for addressing high technology crime and to advise the agency or agencies designated by the Director of Finance on the appropriate disbursement of funds to regional task forces.
- Existing law requires the appointment of specified members to the committee.
- The law would require the executive director to appoint a designee of the Recording Association of America and a designee of the Consumers Union to the committee.
- Existing law provides that, in formulating the comprehensive written strategy for addressing high technology crime throughout the state, the committee shall identify various priorities for law enforcement attention, including the apprehension and prosecution of criminal organizations, networks, and groups of individuals engaged in specified crimes, including robbery, counterfeiting of a registered mark, sale of goods with false identification of their manufacturer, receiving stolen property, removal of a manufacturer's identification, and unauthorized connections to video, cable, television, or like services.
- This law would provide that the committee shall also identify as a priority for law enforcement attention the goal of apprehending and prosecuting criminal organizations, networks, and groups of individuals engaged in the crimes of misappropriation of recorded music for commercial advantage or private financial gain; the transportation of articles containing unauthorized recordings of live performances; the creation and distribution of pirated sound recordings or audiovisual works; and the failure to disclose the origin of a recording or audiovisual work.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement is likely to see more emphasis placed on the pirating of commercial films and voice recordings.

NOTES:

MOTION PICTURE THEATERS: UNAUTHORIZED RECORDINGS

Penal Code Section 653z (Added)
Chapter 670 / Senate Bill 1032

SUMMARY: This law makes it misdemeanor to record a motion picture in a theater without written authority of the owner of the theater.

HIGHLIGHTS:

- Existing law provides that a person admitted to a theater in which a motion picture is to be or is being exhibited who refuses to cease the operation of a video recording device upon the request of the theater owner is guilty of intentionally interfering with and obstructing the operation of a lawful business, a misdemeanor.

- This bill would provide, in addition, that every person who operates a recording device in a motion picture theater while a motion picture is being exhibited, for the purpose of recording a theatrical motion picture and without the express written authority of the owner of the motion picture theater, is guilty of a public offense and shall be punished by imprisonment in a county jail not exceeding one year, by a fine not exceeding $2,500, or by both that fine and imprisonment.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now a misdemeanor to record a motion picture in a theater without written authority of the owner of the theater.

NOTES:

CHANGES IN

FIREARMS

LAWS

FIREARMS: AIRSOFT PISTOLS

Penal Code Sections 417.2, 12001, 12551, 12552
Chapter 246 / Assembly Bill 1455

SUMMARY: Includes devices that shoot any 6-millimeter or smaller BBs within the definition of "BB devices." Prior to this change, only BB guns that shot *metallic* BBs or pellets fell under this definition.

HIGHLIGHTS:

- Allows Airsoft and similar soft-air-type 6 mm BB guns to be sold at retail without the requirement that these devices be entirely orange or green on their exterior surfaces.
- These devices may not be sold to a minor nor may they be furnished to a minor without the consent of the minor's parent or legal guardian.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: No immediate law enforcement impact anticipated.

NOTES:

FIREARMS: FIREARMS ELIGIBILITY CHECKS

Penal Code Section 12077.5
Chapter 298 / Senate Bill 255

SUMMARY: Provides a procedure whereby any person may obtain a determination directly from the DOJ as to whether he or she is eligible to possess firearms.

HIGHLIGHTS:

- The DOJ is authorized to charge a $20 fee for each check.
- No person may require or request another person to obtain such a firearms eligibility check.
- The application form to request such an eligibility check will be made available on the DOJ Firearms Division website.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: No immediate law enforcement impact anticipated.

NOTES:

FIREARMS: ENFORCEMENT OF FIREARM OWNERSHIP RESTRICTIONS / INCREASE IN TIME FIREARMS MAY REMAIN IN CUSTODY OF LAW ENFORCEMENT

Penal Code Sections 12021, 12028.7
Chapter 830 / Assembly Bill 2695

SUMMARY: Requires the DOJ, subject to available funding, to work with the State Judicial Council, the California Alliance Against Domestic Violence, prosecutors, and law enforcement, probation, and parole officers to develop a protocol designed to facilitate the enforcement of restrictions on firearm ownership.

Except where a procedure is already provided by existing law, requires a receipt issued when firearms are taken into custody by a law enforcement officer to include a time limit for recovery. Increases the time that an agency may hold such firearms from 48 hours to five business days when no action is taken by the agency regarding those firearms.

HIGHLIGHTS:

- The protocol is required to be completed on or before January 1, 2005.
- Protocol will include notice to defendants who are restricted of the procedures by which they shall dispose of firearms when required to do so, explain how defendants shall provide proof of the lawful disposition of firearms, and explain how defendants may obtain possession of seized firearms when legally permitted to do so.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement will be asked to participate in the development of the protocol. Requires a receipt issued when firearms are taken into custody by a law enforcement officer to include a time limit for recovery. Increases the time that an agency may hold such firearms from 48 hours to five business days when no action is taken by the agency regarding those firearms.

NOTES:

CHANGES IN

TRAFFIC

LAWS

TAXICABS & PASSENGER VEHICLES FOR HIRE: IMPOUNDMENT

Vehicle Code Section 21100.4
Chapter 658 / Assembly Bill 299

SUMMARY: This law adds Section 21100.4 to the California Vehicle Code (VC), requiring a magistrate presented with an affidavit by a peace officer establishing reasonable cause to believe that a vehicle is being operated as a taxicab, or other passenger vehicle for hire, in violation of licensing requirements adopted to issue a warrant or order, authorizing any peace officer to immediately impound the vehicle for a period not to exceed 30 days. The law also provides procedures for release of the vehicle prior to the end of the 30 day period.

HISTORY: This law was sponsored by the City of Los Angeles to further improve law enforcement efforts to apprehend illegally operating taxicabs. These taxicabs are operating without obtaining business licenses and city permits as required by rules and regulations that have been adopted within local jurisdictions as authorized by Section 21100(b) VC. Strict enforcement of permit regulations is desirable in order to ensure public safety from unscrupulous operators and potentially dangerous people. These permit requirements guarantee that vehicles meet minimum safety standards, ensure that legal operators are not placed at a competitive disadvantage, and protect the local revenue source.

AB 3476 (Peace) (Ch. 872, Stats. 1992) explicitly authorized impoundment of taxi's illegally operating at or near a public airport or along the Mexican border. That statute extended authorization for impoundment to peace officers and was subsequently amended to authorize those public employees actually providing enforcement services (i.e., local transportation inspectors) to impound vehicles.

HIGHLIGHTS:

- Magistrates, presented with an affidavit by a peace officer establishing reasonable cause to believe that a vehicle is being operated as a taxicab or other passenger vehicle for hire in violation of licensing requirements adopted by a local authority, would be required to issue a warrant or order authorizing any peace officer to immediately seize and cause the removal of the vehicle.
- The vehicle would be authorized for impoundment for a period not to exceed 30 days.
- Procedures for release of the vehicle prior to the end of the 30-day period are provided.
- Charter-party carrier of passengers, as defined in 5350 PUC, would be prohibited from advertising or otherwise representing their services to the public as a taxicab or taxi service.

POINTS OF INTEREST

- Section 27908 of the California Vehicle Code (VC) defines a "taxicab" as a passenger vehicle designed for carrying not more than eight persons, excluding the driver, and used to carry passengers for hire. "Taxicab" shall not include a charter-party carrier of passengers defined in Public Utilities Code.
- Section 464 VC defines "passenger transportation vehicle" as any vehicle, including a trailer bus,

designed, used, or maintained for carrying more than 10 persons including the driver, which requires the person to have in his or her immediate possession a valid driver's license for the appropriate class of vehicle to be driven endorsed for passenger transportation.

- Section 465 VC defines a “passenger vehicle” as any motor vehicle, other than a motortruck, truck tractor, or a bus, as defined in Section 233, and used or maintained for the transportation of persons. The term "passenger vehicle" shall include a housecar.

- Section 260 VC defines a commercial vehicle as a motor vehicle of a type required to be registered under this code used or maintained for the transportation of persons for hire, compensation, or profit or designed, used, or maintained primarily for the transportation of property.

- Section 5360 PUC defines "charter-party carrier of passengers" as every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state.

- There is no law authorizing local authorities to impound a taxicab or passenger vehicle for hire when that vehicle has been investigated and found to be operating in violation of local licensing requirements as adopted by a city ordinance or resolution.

NOTES:

HOUSEHOLD GOODS CARRIERS

Public Utilities Code Sections 5102, 5111, 5133, 5142, 5143, 5243. 5244, 5244.5, 5311, 5316, 5317
Chapter 646 /Assembly Bill 845

SUMMARY: This law prohibits a household goods carrier from engaging or attempting to engage in the business of the transportation of household goods and personal effects without a valid permit. Further, this law grants impound authority for the illegal, improper transportation of household goods to any peace officer, including local police departments and/or county sheriff's offices.

HISTORY: Intrastate household goods carriers (movers) are regulated by the Household Goods Carriers Act, which sets forth licensing requirements, and regulates the business practices and rates which may be charged by carriers (Interstate movers are regulated by federal law). Although CPUC has primary jurisdiction over enforcement of the Household Goods Carriers Act, other enforcement agencies, such as the Attorney General's office, district attorneys, and city attorneys, also have enforcement authority.

This law would amend the Household Goods Carriers Act to increase the penalties for unlicensed operators, provide consumers with greater notice of their legal rights, and clarify the allowable charges by a carrier. Several of the bill's provisions are within the jurisdiction of the Senate Energy, Utilities, and Communications Committee.

HIGHLIGHTS:

- Section 5133 of the Public Utilities Code (PUC) would be amended creating subdivisions (a), (b), and (c) to outline sanctions for household goods carriers, who operate without a permit, identify what type of specific authority is required to operate, and to clarify the definition of the term, "business of transportation".

- Subdivision (a) expands the meaning of the term, "business of transportation," to include advertising, soliciting, offering, or entering into an agreement to transport used household goods. It also indicates a permit issued by California Public Utilities Commission (CPUC), or an operation authority issued by FMCSA would be required to authorize interstate movement. This subdivision would create a statutory authority for enforcement personnel to take legal action against household goods carriers involved in interstate commerce, when operating without a valid federal operating permit.

- Subdivision (b) would prohibit household goods carriers who are operating without a valid permit or operating authority, from recovering funds or other relief regarding agreements to transport, or the transportation of household goods or related services. A person who utilizes the services of a household goods carrier who is operating without a valid permit or operating authority is authorized to file suit in court to recover all compensation paid to the aforementioned household goods carrier.

- Subdivision (c) is added to authorize any peace officer to impound a motor vehicle used in the business of transporting household goods which is operating without a permit or operating authority as required in subdivision (a).

- The law enforcement agency would be given the authority to impound a vehicle for a period not to exceed 72 hours when requested to do so by CPUC, the Attorney General, the district attorney, or county counsel. Section 5244.5 is added to the Public Utilities Code providing that this statute does not apply to a sub-hauling agreement when the sub-hauler is not otherwise subject to this statute for activity relating to a sub-hauling agreement.

- This law makes a technical change to 5317.5 of the Public Utilities Code providing that upon request of the commission, the Attorney General or the district attorney of the county or city may (as opposed to shall) aid in any investigation, hearing, or trail had under this chapter.

POINTS OF INTEREST

- Section 5133 of the Public Utilities Code provides that no household goods carrier shall engage, or attempt to engage, in the business of the transportation of used household goods and personal effects, by motor vehicle over any public highway in this state, unless there is in force a permit issued by the commission authorizing those operations.

NOTES:

VEHICLES: TERMINAL INSPECTIONS

Insurance Code Section 11580.9; Vehicle Code Sections 34501.12, 34620, 34621 Chapter 729 / Assembly Bill 1238

SUMMARY: This law requires motor carriers to provide evidence of enrollment in both the Biennial Inspection of Terminals (BIT) program, and a controlled substances and alcohol testing (CSAT) program, as part of the process to obtain a Motor Carrier of Property Permit (MCPP). Additionally, the amended language creates an increase in the fees required for an initial BIT inspection. Additionally, This law extends current law by adding section 97.1 to the Streets and Highways Code which addresses "Safety Enhancement Double Fine Zones," and provides that the five mile section of State Highway Route 101 between the Eureka Slough Bridge No. 4-22 and the Gannon Slough Bridge No. 4-24 in Arcata is a "Safety Enhancement Double Fine Zone."

HISTORY: Since 1989, the CHP has been mandated to inspect, at least every 25-months, every motor carrier terminal in this state that operates certain types of commercial motor vehicles (primarily, but not limited to, truck-tractor/trailer combinations).

HIGHLIGHTS:

- Amends Section 34501.12 VC, Subdivision (d)(1), to require the CHP to inspect every terminal of every motor carrier prior to the issuance of an original MCPP, and at least every 25 months thereafter.

- Subdivision (g)(1) makes it a crime for a motor carrier to operate a vehicle regulated under the BIT program prior to having a BIT inspection completed. In discussions between CVS and the California Dump Truck Owner's Association (CDTOA), there is a belief in the trucking industry that some motor carriers have eluded BIT inspections by avoiding enrollment, either intentionally or unintentionally.

- Amends Section 34501.12(e) VC to increase fees for an initial BIT inspection from $400 to $650 per terminal. In the case of a motor carrier who operates not more than one power unit and three trailers, the fees will increase from $100 to $400 per terminal. Fees for renewal BIT inspections remain at the current levels. This increase would defray the additional administrative costs of determining the compliance of initial motor carriers.

- Amends Section 34620 VC to require a motor carrier to be enrolled in the BIT program, prior to DMV's issuance of a MCPP Permit.

- Section 34621(b)(8) and (9) VC were amended to assist DMV with the processing cost associated with motor carrier compliance with the MCPP program. Deleting "evidence" and replacing it with "carrier certification" will allow the motor carriers to "self" certify to DMV that they comply with the BIT program and the CSAT program when applying for the MCP permit. The Department, upon conducting a terminal inspection, will be able to verify if the motor carrier had completed the BIT program requirements when filing and receiving the MCPP.

- Amends Section 34621(b)(8) VC to reference 34501.12 (e) and (h) VC, which directs the submission of an application and fees for all initial inspections, renewal inspections, and required

re-inspections following any less-than-satisfactory ratings. Upon submission of an application and fees for the BIT program, the Department will issue a letter to the motor carrier confirming that the application and fees have been received.

- Deletes the reference to "owner-operator and a non-regulated motor carrier".

- Amends Section 34501.12(e) (1) VC to ensure all vehicles or combination of vehicles not required to comply with BIT, would not mistakenly be included.

- Amends Section 11580.9 (b) (1) of the Insurance Code revising the definition of a commercial vehicle for the purposes of providing that a "commercial vehicle" means a type of vehicle subject to registration or identification under the laws of this state and is one If the following:
  Used or maintained for the transportation of persons for hire, compensation, or profit.
  Designed, used, or maintained primarily for the transportation of property.

- Adds section 97.1 to the Streets and Highways Code which addresses "Safety Enhancement Double Fine Zones," and provides that the five mile section of State Highway Route 101 between the Eureka Slough Bridge No. 4-22, and the Gannon Slough Bridge No. 4-24 in Arcata is a "Safety Enhancement Double Fine Zone." This section will remain in effect until January 1, 2006.

POINTS OF INTEREST

- Section 34501.12 VC requires motor carriers of certain vehicles to submit an application and fees for a BIT inspection, and to ensure that the inspection is completed within a 25-month period. Failure to comply with this section is a misdemeanor.

- Section 34620 VC prohibits motor carriers of property, as defined in Section 34601 VC, from operating certain commercial motor vehicles without obtaining a California Carrier Identification (CA) number, and registering that number with the Department of Motor Vehicles (DMV). Upon proper registration, the DMV issues the motor carrier an MCPP as proof of the registration. It is a misdemeanor to operate the commercial motor vehicle on a highway without an MCPP issued pursuant to Section 34620 VC.

- Section 34621 (b) VC establishes required application information for an original or renewed motor carrier permit.

- Section 11580.9 (a) (1) of the Insurance Code defines a commercial vehicle by referencing Section 260 of the Vehicle Code.

- Section 97 of the Streets and Highways Code requires the Department of Transportation (DOT), in consultation with the Department of California Highway Patrol (CHP), to develop specified pilot projects to designate certain sections of highway as "Safety Enhancement Double Fine Zones," which result in increased fines for traffic violations occurring within these sections of highway. Under existing law, the five mile portion of State Highway Route 101 between the Eureka Slough Bridge No. 422 and the Gannon Slough Bridge No. 424 in Arcata is designated as such a zone. These provisions are in effect until January 1, 2004.

NOTES:

VEHICLES: BICYCLE RACKS ON BUSES

Vehicle Code Section 1409
Chapter 399 /Assembly Bill 1409

SUMMARY: This law authorizes a 45 foot bus to have a device attached to the front that is designed and used exclusively for transporting bicycles. Bus operation is to be on a route approved by a specified route review committee established by the general manager of the transit agency.

HIGHLIGHTS:

- Allows a 45 foot bus to attach a folding device to the front of the bus that is designed and used exclusively for transporting bicycles.
- This device shall not extend more than 36 inches measured from the front portion of the body.
- When the device is loaded with a bicycle, the leading edge of the handle bars of the bicycle shall not extend 42 inches measured from the front of the bus.
- Creates a "Route Review Committee" for the purpose of determining which routes are suitable for the safe operation of 45 foot busses that are equipped with a front mounted bicycle rack.
- This committee would consist of a member from the public agency and a traffic engineer, to be chosen by the general manger of the public agency and a non-exclusive member to represent the bus drivers, who will be chosen by a vote conducted by the other bus drivers.

POINTS OF INTEREST

- Existing law prohibits a vehicle operated on the highway from exceeding a length of 40 feet with certain exceptions. Among those exceptions is a bus operated by a public agency or a passenger stage corporation, as defined in Section 226 of the Public Utilities Code, used in transit system service, other than a schoolbus, when the excess length is caused by a folding device that is attached to the front of the bus and is designed and used exclusively for transporting bicycles. Existing law prohibits the specified folding device from being used on a bus that exceeds 40 feet in length, exclusive of the device, or on a bus having a device for transporting bicycles attached to the rear of the bus.
- In 1991, the Intermodal Surface Transportation Efficiency Act (ISTEA) required states to increase the 40-foot length limitation for buses up to a maximum of 45 feet on those roads which are designed to the highest standards established in the National Networks (NN). The California Department of Transportation (Caltrans) or local authorities, with respect to those highways under their respective jurisdictions, may also allow these longer buses on California highways deemed capable of safely accommodating their larger size. California law currently allows a device, designed and used exclusively for transporting bicycles to be attached to the rear of a bus over 40 feet in length provided the total length of the bus, including the device or load, does not exceed 50 feet.
- Title 23 of the United States Code, Section 658.16, describes the exemptions for extensions on vehicles operating on the National Network Highway (Federally funded highway). Buses are

allowed to be no more than 45 feet in length, but have no exemptions for any exterior extensions to be attached when operating on the National Network. The National Network is not only freeways, but includes State Routes that are specifically funded. The folding device mentioned in the bill is a load carrying device and would be inclusive of the measurement of the bus.

- Section 35402 VC addresses extensions, but no specific exemptions for buses over 40 feet.

- Section 35400(b) VC provides that Section 35400 VC does not apply to specific vehicles as recorded in this section. Section 35400(b)(10) provides for an exception for interstate and some intrastate operated buses. This exemption allows a bus operating on the National Network to be up to 45 feet in length. This reference also provides that these buses shall not be denied reasonable access between the highways specified in subdivision (a) of Section 35401.5 VC and points of loading and unloading of passengers as per the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 (Title 23 CFR, Section 658.13 for the length allowance and Section 658.19 for the reasonable access).

NOTES:

HIGHWAYS: TRUCK SIZING

Senate Joint Resolution
Chapter 103 / Senate Joint Resolution 7

SUMMARY: This law would respectfully memorialize the President and the Congress of the United States to maintain the current federal truck size and weight limitations and to oppose proposals to experiment with longer and heavier trucks on public highways in the reauthorization of the federal Transportation Equity Act for the 21st Century (TEA 21).

HISTORY: President Eisenhower's role in the creation of the interstate system began 1956 with message after message stressing the urgent need for better highways - the State of the Union Address, in separate remarks that same day, in his annual budget message, in his annual economic report. In a Jan. 31, 1956, meeting with Republican legislative leaders, he announced a key change by breaking with the Clay Committee and endorsing the pay-as-you-go method of financing. The federal government began to regulate the size of trucks when the Federal-Aid highway Act of 1956 established the maximum width vehicle of 96 inches on interstate highways.

This was increased to 102 inches for buses in 1976 and to 102 inches for all commercial vehicles by the Surface Transportation Assistant Act (STAA) of 1982. STAA authorized the establishment of a “national network” (NN) for trucks, truck tractors and semitrailer, and/or trailer combinations to operate where size, weight and length limits were standardized throughout the Unite States (US). STAA includes the Interstate system and other designated highways (state routes, terminal access routes,..) which on June 1, 1991, were part of the Federal-Aid Primary System in effect at the time. The National Network totals over 200,00 miles of highway across the nation.

PROGRAM BACKGROUND: The federal Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, a comprehensive transportation funding and statutory measure, established a moratorium on any increases in truck lengths and weights by the states, including a prohibition on the operation of longer combination vehicles (LCVs) which had not been authorized prior to the enactment of ISTEA, such as tractor-triple trailer combinations ("triples"). The act, however, permitted the continued operation of LCVs in those states that had approved such vehicles, but did not prevent these states from enacting further restrictions or prohibitions on the use of these vehicles. According to the federal Department of Transportation, longer combination vehicles have been authorized to operate in 16 western states and on a few turnpikes in the some eastern states. The Transportation Equity Act for the 21st Century (TEA-21), the successor measure to ISTEA, continued the vehicle length and weight restrictions included in the earlier measurement.

Past studies conducted on the subject of increased truck lengths and weights have generally shown the potential for "large reductions" in shipping costs, but added costs for infrastructure wear and damage, significant negative economic effects on the railroad industry, possible disruption of traffic flows, and adverse impacts on vehicle safety.

Writing in support of this measure, the Consumers for Auto Reliability and Safety noted that the "U.S. Department of Transportation has found that double and triple trailer trucks pose a significantly increased risk of fatal crashes involving occupants of passenger vehicles. A road test conducted by the California Department of Transportation found that triple trailer trucks experienced extended periods of sideways "whip and sway" and slower speeds on grades adding dangers for all motorists.

2004 LEGAL UPDATE

HIGHLIGHTS:

- This Resolution petitions the President and the Congress of the Untied States to reject the federal proposal to experiment with longer and heavier trucks on public highways.

POINTS OF INTEREST

- The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) froze the size, length and weights of a truck tractor with two or more semitrailers, or trailers, operating on the interstate system (National Network) at the limits actually and lawfully in effect for such vehicles in a state on June 1, 1991.

- Existing law establishes maximum length, width, height and weight limits for a variety of vehicles and vehicle combinations. Combination of vehicles may not exceed a total weight of 80,000, while lower maximum weights are in effect for certain vehicles based on the number of axles on the vehicle and the particular distance between the axles.

- The total length of combination of vehicles (tractor and one or two trailers) is limited to 65 feet generally, although a 75-foot maximum length authorization is in effect for a tractor-semitrailer-semitrailer or trailer combination if neither the semitrailer nor the trailer exceeds 28 feet.

- In addition, in recognition of the preemption of federal provisions on truck sizes and access, state law includes an exemption regarding truck length limits for combination of vehicles operating on an interstate highway or when using those portions of specified federal-aid primary highways and routes that provide access to terminals and facilities for fuel, food, lodging and vehicle repair.

NOTES:

VEHICLES: WEIGHT LIMITS

Vehicle Code Section 35715.1
Chapter 15 /Assembly Bill 582

SUMMARY: This law adds Section 35715.1 VC authorizing the County of Tuolumne to prohibit specified vehicles weighing 7,500 pounds or more from using Old Priest Grade, a roadway located in that county.

HISTORY: Old Priest Grade, opened in 1858 as the Priest Grade Wagon Trail and eventually became a part of Highway 120. It is known as one of the most narrow, winding, and steep mountain roads in the State. As a result, a new route, the New Priest Grade was constructed to bypass Old Priest Grade and connect Highway 120. With the creation of the new route, the Old Priest Grade became the county's responsibility and is maintained as a scenic and historical route.

Highway 120 is a popular route to Yosemite Valley from Central California. While both the new and old routes provide virtually the same access, the New Priest Grade is less narrow and less steep but longer in distance as compared to the old route. Despite the existence of the new route, some larger vehicles opt for the shorter distance and are still able to legally travel on the Old Priest Grade.

HIGHLIGHTS:

- County of Tuolumne may, by ordinance, prohibit vehicles weighing 7,500 pounds or more from using Old Priest Grade.
- The Board of Supervisors are authorized to determine the allowable weight limit and specify that limit in the ordinance.

POINTS OF INTEREST

- Section 35700 of the Vehicle Code (VC) provides that the legislative body of any county or city may by ordinance permit the operation and moving of vehicles and loads upon highways under their respective jurisdictions of a maximum gross weight in excess of the maximum gross weight of vehicles and specified loads. This allowance does not apply to state highways.
- Section 35701 of the Vehicle Code (VC) provides that any city, or county for a residence district, may, by ordinance, prohibit the use of a street by any commercial vehicle or by any vehicle exceeding a maximum gross weight limit, except with respect to any vehicle which is subject to Sections 1031 to 1036, inclusive, of the Public Utilities Code.
- Section 1031 of the Public Utilities Code (PUC) provides that no passenger stage corporation shall operate or cause to be operated any passenger stage over any public highway in this State without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any passenger stage corporation as to the fixed termini between which, or the route over which, it was actually operating in good faith on July 29, 1927, nor shall any such certificate be required of any person or corporation who on January 1, 1927, was operating, or during the calendar year 1926 had operated a seasonal service of not less than three consecutive months' duration, sight-seeing

buses on a continuous sight-seeing trip with one terminus only. Any right, privilege, franchise, or permit held, owned, or obtained by any passenger stage corporation may be sold, assigned, leased, mortgaged, transferred, inherited, or otherwise encumbered as other property, only upon authorization by the commission.

- Section 1036 PUC provides that each application for a certificate of public convenience and necessity made under this article shall be accompanied by a fee of five hundred dollars ($500), unless the applicant is already operating in the immediate vicinity under the jurisdiction of the commission. No certificate issued pursuant to, or rights to conduct any of the services authorized by, this article shall be sold, leased, or assigned, or otherwise transferred or encumbered, unless authorized by the commission. A filing fee of three hundred dollars ($300) shall accompany all applications for that authorization.

NOTES:

VEHICLES: VIDEO DISPLAYS

Vehicle Code Section 27602
Chapter 303 / Assembly Bill 301

SUMMARY: This law would provide that persons may not drive a motor vehicle that is equipped with any means of visually displaying a television broadcast or video signal that is operating and is located at any point forward of the back of the driver's seat, or is visible to the driver while operating the vehicle. The prohibition does not apply to specified equipment when installed in a vehicle. This prohibition does not apply to a mobile, digital terminal installed in an authorized emergency vehicle.

HISTORY: Section 27602 VC was last amended in 1980. This law would update the law to cover the advancement of video and electronic technology devices currently offered in vehicles.

Distracted driving has always been a significant factor in traffic collisions. With the miniaturization of technology, devices like televisions and video monitors have been marketed to the motoring public and adopted with great enthusiasm. These and other devices, like hand-held cellular phones have received much attention lately for the hazards that inattentive and distracted driving create.

HIGHLIGHTS:

- Video displays are prohibited only when in actual operation and visible to the driver that are not requisite to the operation of the vehicle.
- Such displays are exempt in any vehicle providing roadside assistance, not limited to authorized emergency vehicles.
- This law attempts to permit the installation of video displays, and to prohibit their use by drivers while the vehicle is in operation, shifting the burden of compliance from vehicle dealers and accessory retailers to drivers.

POINTS OF INTEREST

- Section 27602 (a) VC currently prohibits a television receiver, screen, or other means of visually receiving a television broadcast which is located in a motor vehicle at any point forward of the back of the driver seat, or which is visible to the driver while operating the motor vehicle. Section 27602 (b) VC currently permits information to be displayed on a mobile digital terminal installed in a law enforcement vehicle.
- Section 27602 VC was last amended in 1980. This law would update the law to cover the advancement of video and electronic technology devices currently offered in vehicles.

NOTES:

VEHICLES: MODIFIED EXHAUST: WHISTLE-TIPS

Vehicle Code Section 27150.3
Chapter 432 / Assembly Bill 377

SUMMARY: This law adds Section 27150.3 VC prohibiting a person from modifying the exhaust system of a motor vehicle with a “whistle tip.”

HISTORY: A proliferation of whistle tips in Oakland has sparked a number of complaints to the police department and even the City Council. This law is offered as a means to combat a trend in the author's district where vehicles are being equipped with "whistle tips." These devices, which are small metal cylinders inside a custom-made tailpipe, produce a high-pitched wail when the vehicle is being driven. It is believed that whistle tips were originally designed to frighten deer away from roads in order to avoid collisions.

HIGHLIGHTS:

- May not modify a motor vehicle with a “whistle-tip”.
- May not operate a motor vehicle if it is modified with a “whistle-tip”.
- May not engage in the business of installing a “whistle-tip” onto an exhaust system.
- A “whistle-tip” is a device that is applied to, or is a modification of, a motor vehicle’s exhaust pipe for the sole purpose of creating a high-pitched or shrieking noise when the motor vehicle is operated.
- A person convicted of modifying or operating a vehicle with a “whistle-tip” shall be fined $250.
- A person convicted of convicted of installing a “whistle-tip” shall be fined $1,000.

POINTS OF INTEREST

- Section 24005 VC provides it is unlawful for any person to sell, offer for sale, lease, install, or replace, either for himself or as the agent or employee of another, or through such agent or employee, any glass, lighting equipment, signal devices, brakes, vacuum or pressure hose, muffler, exhaust, or any kind of equipment whatsoever for use, or with knowledge that any such equipment is intended for eventual use, in any vehicle, that is not in conformity with the Vehicle Code or any regulations enforced within this State.
- Section 27150 of the Vehicle Code (VC) provides vehicles subject to registration not equipped with, or emitting excessive noise. The section does not describe any one particular device, but addresses the system shall have an adequate muffler maintained to prevent excessive or unusual noise. The section continues to describe that the exhaust system shall not be equipped with a cutout, bypass, or similar device.
- Section 27150.1 VC provides no person engaged in the business of selling exhaust systems or the parts thereof, shall not sell or install exhaust systems, including non-original equipment, not in

compliance with regulations established by the California Highway Patrol (CHP) as recorded in Title 13 California Code of Regulations (CCR) in Sections 600 to 613 and Sections 1030 to 1054.

- Section 27151 (VC) provides that no person shall modify or operate a motor vehicle where the exhaust system will amplify or increase the noise emitted by the motor of the vehicle, so the vehicle is not in compliance with related regulations or exceeds the noise limits established for the type of vehicle. Motor vehicle exhaust systems or parts thereof include, but are not limited to, non-original exhaust equipment.

- Title 13 CCR Sections 600 to 613 and Sections 1030 to 1054 of this Title provide specific standards for dealer sales and installation of exhaust systems, including non-original exhaust equipment. The sections also provide testing requirements which establish an acceptable decibel (dB) rating that has been determined by the American National Standards Institute Standard (ANSI) and Society of Automotive Engineers Standard (SAE).

NOTES:

VEHICLES: LICENSE PLATE DISPLAY: PERSONS WITH DISABILITIES

Vehicle Code Section 5201
Chapter 626 /Assembly Bill 1303

SUMMARY: This law allows the view of a rear license plate to be obstructed by a wheelchair lift or wheelchair carrier.

HIGHLIGHTS:

- Persons with disabilities, and those transporting them, are permitted to remove and relocate wheelchair lifts and carriers without removing and reattaching the vehicle's rear license plate.
- This authorization to impair the readability of a rear license plate is contingent upon the vehicle's owner having been issued a disabled person's license plate or placard.
- The vehicle operator is required to display on the rear window a decal designed by the Department of Motor Vehicles (DMV), in a location determined by DMV and the California Highway Patrol (CHP), containing the license plate number of that vehicle.
- It would also exempt such license plates and license plate numbers on vehicles displaying such decals from the requirement to be illuminated.
- DMV is required to adopt regulations regarding applying for and issuing these decals.

POINTS OF INTEREST

- Section 5201 of the Vehicle Code (VC) provides that license plates shall at all times be securely fastened to the vehicle for which they are issued so as to prevent the plates from swinging and shall be mounted in a position to be clearly visible, and shall be maintained in a condition so as to be clearly legible.

NOTES:

NOTIFICATION: SCHOOL OFFICIAL SUBSTANCE ABUSE

Health and Safety Code Section 11591; Penal Code Section 291.1
Chapter 536 /Assembly Bill 608

SUMMARY: This law would require Law Enforcement, including the California Highway Patrol (CHP) to immediately notify, by telephone, the superintendent of schools upon the arrest of a school employee for specified controlled substance offenses and specified sex offenses provided that he or she knows the arrestee is a school employee. Law Enforcement shall also immediately provide written notice to the superintendent of schools and the Commission on Teacher Credentialing.

HIGHLIGHTS:

- Require law enforcement, including the CHP, to notify the superintendent of schools and the Commission on Teacher Credentialing that a school employee was arrested for specified substance abuse offenses or specified sex offenses if they knew the arrestee was a school employee.
- Clarify that the sheriff or chief of police would be required to make the appropriate notifications when a school employee is arrested for specified drug or sex offenses.
- Change the name of the Commission for Teacher Preparation and Licensing to the Commission on Teacher Credentialing.

POINTS OF INTEREST

- Current law requires the sheriff or chief of police to immediately notify the superintendent of schools of the appropriate school district, by telephone, if any school employee is arrested for specific controlled substance offenses which would require a person to register as a convicted drug offender or an offense that would require the person to register as a sex offender.
- The sheriff or chief of police is required to immediately provide additional written notice of the arrest to the Commission for Teacher Preparation and Licensing and to the appropriate superintendent of schools if the employee is a teacher in a public school.
- If the employee is not a teacher, the sheriff or chief of police shall immediately notify the superintendent of schools by telephone, and shall immediately notify the governing board of the appropriate school district.
- If the employee is a private school teacher the sheriff or chief of police is required to immediately, by telephone and in writing, notify the private school authority employing the teacher.
- The language contained within current law is vague and could be misleading causing a sheriff or chief of police to believe that the arrested teacher or school employee is responsible for contacting the appropriate school authorities, thereby opening themselves up to liability for failure to make the appropriate notifications.

NOTES:

ALCOHOL BEVERAGES & CONTROLLED SUBSTANCES: MINORS

Business & Professions Code Section 25658.2
Chapter 625 /Assembly Bill 1301

SUMMARY: This law provides that a parent, or legal guardian, is guilty of a misdemeanor if the child is allowed to consume alcoholic beverages or use controlled substances at the home and the child has a blood-alcohol concentration of 0.05% or greater or is under the influence of a controlled substance. Further, the parent must have knowingly permitted the child to drive a vehicle and that child must have caused a traffic collision while driving for the parent to be charged.

HIGHLIGHTS:

- A parent, or legal guardian, knowingly permits a child under the age of 18 to consume an alcoholic beverage or use a controlled substance at their home is guilty of a misdemeanor if:
- The child, after leaving the home, drives a vehicle;
- While she or he has a blood-alcohol concentration of 0.05% or greater, or is under the influence of a controlled substance &;
- Causes a traffic collision.

POINTS OF INTEREST

- Section 25658 of the Business and Professions Code (BPC) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

NOTES:

VEHICLES: SEATBELTS: FINES

Vehicle Code Section 27315
Chapter 521 / Assembly Bill 1625

SUMMARY: This law addresses Section 27315 of the Vehicle Code (VC) by deleting language that requires the inclusion of the penalty assessments and court costs in determining the maximum amount of the fine that may be imposed. This law would instead allow other penalty assessments and court costs to be added to the maximum $20 or $50 fine imposed on first and subsequent seat belt violations, thus raising the fine for violating the State's seat belt law.

HIGHLIGHTS:

- This law deletes the inclusion of penalty assessments and court costs in determining the maximum amount of a fine that may be imposed.
- As amended, the fine for a seat belt violation for a first offense would be $20 plus court cost and penalty assessments (roughly $41) and for a second offense, or any subsequent violation, would be $50 plus court cost and penalty assessment (roughly $106).
- This law deletes subdivision (i) of Section 27315 VC which provides additional penalty assessments in the amount of $2 for a first offense, and $5 for any subsequent violation of 27315 (d), (e), or (f).

POINTS OF INTEREST

- Section 27315 VC mandates that every person in a motor vehicle shall wear a seat belt and provides specific exclusions for the operator and specific requirements for passengers. This section, as written, is also unique by requiring a specified fine amount to include penalty assessments and court costs in determining the maximum amount of the fine that may be imposed. Currently the maximum amount for a first offense shall not exceed $20, and for a second offense, and any subsequent offense, the maximum is $50. The section does allow for an additional penalty assessment of $2 for the first offense and $5 for the second and subsequent offenses.
- With the current assessments and court cost being included, the actual fine amount for a first offense is $3. For a second and subsequent offense the fine is $4.

NOTES:

DMV FEES

Multiple Sections / Multiple Codes
Chapter 719 / Senate Bill 1055

SUMMARY: This law would authorize the DMV to increase fees upon the issuance of driver's licenses, vehicle registrations, transfers of vehicle title, and other related services, thus bolstering the Motor Vehicle Account (MVA), and the State Highway Account (SHA).

HISTORY: In 1991 the federal Intermodal Surface Transportation Efficiency Act (ISTEA) mandated that all states be members of the International Registration Plan (IRP) and administer the IRP agreement in a uniform manner. California has been a member of the IRP since 1985, but on an exception basis. California has maintained its commercial vehicle weight fee system on an un-laden or empty weight basis, while other jurisdictions base their weight fees on a vehicle gross weight (loaded) capacity. California is also the only IRP member that registers commercial trailers and collects trailer weight, registration and vehicle license fees annually. Other members charge a one-time or multi-year fee for the identification of trailers. During the 1999-2000 legislative sessions Senate Bill 2084 was chaptered in compliance with the ISTEA. SB 2084 was initially thought to be a "fee neutral" program, neither increasing nor decreasing revenue within the MVA. SB 2084 actually caused a revenue loss or "fee negative" situation.

HIGHLIGHTS:

- Section 1678 VC was added requiring fees in specified sections of the California Code of Procedures (CCP), Revenue and Taxation Code (RTC), and the VC to be the base fee amounts charged by the DMV between January 1, 2004, and December 31, 2004. DMV would then be required to adjust those fees annually in accordance with California Consumer Price Index (CCPI) by January 1, 2005, and annually thereafter on January 1. Section 1685 VC would be amended to allow DMV to charge a transaction fee of three dollars, which would be deposited into the MVA. This transaction fee would be adjusted annually in accordance with the CCPI.

- Driver license, registration, and transaction fees, would raise the specified fees from a range of $3 to $10, to a set fee of $15.

- DMV is allowed to use no more than $50,000 annually for the purpose of continual promotion of the California Memorial License Plate Program. Those funds will originate from the fees collected from the issuance, renewal transfer, and substitution of the California Memorial license plate.

- The basic registration fee is increased from $28 to $31.

- Raises additional registration fees from $1 to $3, and increases an additional fee for specified commercial motor vehicles (CMV) from $2 to $6.

- Raises fees for initial registration or registration renewal for every vehicle except those described in 5014.1 (a) VC, from $1 to $6.

- 9400.1 (c) (1) VC is added to the Vehicle Code which reduces the proposed 42 percent fee increase in the state's Heavy Commercial Truck Weight Fee Program by approximately 20 percent, and requires each commercial vehicle registered in the International Registration

Program (IRP) to display the gross operating weight of the vehicle to allow CHP to effectively enforce this program.

- Provides DMV with the authority to increase the Truck Weight Fee approximately 13 percent should final revenues for 2003-2004 not meet the projected level of $789 million dollars.

- Provides that DMV, in consultation with the CHP, design and make available a set of weight decals that reflect the declared gross combined weight or gross operating weight reported to the department at the time of initial registration, registration renewal, or when a weight change is reported to DMV. A new decal shall be issued on each renewal or when a weight change is reported. The decal for a tow truck that is subject to this section shall indicate the gross vehicle weight rating or weight code. Furthermore, DMV may charge a $10 fee for the DMV's production and issuance of each set of decals. The weight decal must be in sharp contrast to the background and shall be of a size, shape, and color that are legible during daylight from a distance of 50 feet. Each vehicle subject to this section shall display the weight decal on both sides of the vehicle, and a person may not display a decal on a vehicle issued pursuant to this statute that does not indicate the declared weight reported to DMV. With the exception of subdivision (e) of this section, the funds collected by DMV under this subdivision shall be deposited in the State Treasury to the credit of the Motor Vehicle Account in the State Transportation Fund. This subdivision becomes effective July 1, 2004.

- Increases the fee for each renewal of a non-commercial DL from $15 to $24.

- Increases both of the application fees for an original class "C" or "M" from $12 to $24, and would change the expiration date from the fourth to the fifth birthday after issuance.

- Increases the renewal fee of a DL or a DL to operate a different class vehicle from $15 to $24.

- Increases the fee for a duplicate DL or change of name on a DL from $12 to $19.

- Increases the application fee for an identification card (IDC) from $6 to $20. Additional changes allows DMV to issue an original or replacement senior citizen IDC free of charge.

- Allows a certificate of non-operation for an off-highway motor vehicle to be valid until the vehicle registration is renewed. The Department of Motor Vehicles is prohibited from imposing a penalty for the delinquent payment of fees, if an application for renewal of identification is received on or before the date the vehicle is first operated, used, or transported on public or private property. This applies if the vehicle is used in a manner which subjects the vehicle to certification and identification of non-operation requirements in existing law. The filing fee for a certificate of non-operation is increased from $5 to $15.

- Increases the fee for the issuance or renewal of registration for an off-highway motor vehicle from $1 to $3 and requires DMV to deposit these fees into the Motor Vehicle Account in the State Transportation Fund.

- Increases the fee paid at the time of issuance or renewal of registration for an off-highway motor vehicle from $1 to $3 and requires DMV to deposit these fees into the Motor Vehicle Account in the State Transportation Fund.

- Additional fees collected pursuant to these increases cannot be used for research, planning, construction and improvements of exclusive public mass transportation guide ways, including mitigation of environmental effects, payment for property taken or damaged, administrative costs

of the foregoing, maintenance of structures, and immediate right of way for public mass transit guide ways. However, maintenance and operating costs for mass transit power systems and mass transit passenger facilities, vehicles, equipment, and services are excluded from this prohibition.

POINTS OF INTEREST

- Existing law necessitates fees upon issuance of vehicle registrations, driver licenses, transfers of vehicle title, and other related services provided by the DMV.

- DMV currently issues memorial license plates generating revenue from the issuance, renewal, and transfer of these plates. Existing law requires this revenue to be deposited, as specified, into the California Memorial Scholarship Fund and the Anti-terrorism fund. DMV is required to deduct costs relative to this agenda, for the administration of the California Memorial license plate program.

- Section 9400.1 VC imposes weight fees for specified commercial motor vehicles and tow trucks with a declared gross vehicle weight of 10001 lbs or more.

- Section 38121 VC provides that the owner of an off-highway motor vehicle who plans on not renewing his vehicle registration, file under penalty of perjury, a certification that the vehicle will not be operated, used, or transported on public or private property. The certification of non-operation is valid until midnight of the 30th day of June in the second calendar year following the year of certification, but may be renewed biennially prior to its expiration.

- Section 1685 of the Vehicle Code authorizes DMV to establish contracts for electronic programs with private parties that allow qualified private industry partners to join DMV in providing title and vehicle registration transactions. DMV is also authorized to enter into contractual agreements with three specified private industry partners.

- DMV is currently authorized to charge a transaction fee to a qualified private industry partner for information and services provided. All fees are required to be deposited into the Business Partner Automation Account in the Special Deposit Fund. These funds must be available upon appropriation, to the DMV for maintaining, monitoring, and enhancing the process and payment programs for vehicle registration and titling transactions.

NOTES:

CASE

LAW

SUMMARIES

Clark v. Murphy

(9th Cir. 2003) 331 F.3d 1062

SUBJECT: Miranda; Request for an Attorney

RULE: "I think I would like to talk to a lawyer" is an equivocal, ambiguous statement and therefore *not* a legally effective invocation of the *Miranda* right to counsel.

FACTS: Shortly after defendant's stepmother and her car disappeared from Phoenix, Arizona, defendant sold the car to a California dealership, causing Phoenix homicide investigators to focus on him as a suspect. Defendant was arrested days later in Chandler, Arizona, for car theft, at which time he was advised of his *Miranda* rights and indicated that he understood them. He was thereafter taken to an interrogation room in Phoenix where, after again being advised per *Miranda* and again indicating that he understood those rights, Detective Masino questioned him about the missing car. During this interview, which lasted approximately 35-minutes, defendant confessed to stealing his stepmother's car. Some three hours later, Masino returned for a second interview, this time accompanied by Detective Chambers. Chambers identified himself as a homicide detective investigating the disappearance of defendant's stepmother. Chambers also re-advised defendant of his *Miranda* rights which defendant again acknowledged that he understood. As defendant attempted to provide an explanation for taking his stepmother's car, Chambers finally told him there were "serious problems" with his story. At this point, defendant stated, "*I think I would like to talk to a lawyer.*" Chambers responded that if defendant wanted a lawyer, he would get one for him, but that if he did, he expected that their dialogue would be over. Chambers then told defendant to think about it for a few minutes while he interviewed defendant's sister. When Chambers returned some 30 minutes later, defendant volunteered that he did *not* want a lawyer, explaining that talking to the detective was helping him to deal with the situation. However, after 20 more minutes of questioning, defendant asked, "*Should I be telling you or should I talk to a lawyer*?" Chambers responded by asking whether defendant was seeking his personal or professional opinion, to which defendant replied that he wanted the detective's own opinion. After about two minutes of silence, Chambers responded by telling defendant that if his case ever got to a judge or jury, they would be more concerned with hearing about "remorse," and that remorse should "outweigh fear of punishment." Defendant then indicated that he wanted to continue talking; shortly thereafter he confessed to killing his stepmother and later led officers to the body. At his trial, defendant's motion to suppress his confession was denied, and he was convicted of second degree murder and theft. After proceeding through the state courts and a federal district court, defendant appealed to the Ninth Circuit, contending primarily (1) that he had twice invoked his *Miranda* right to counsel, but also (2) that his confession had been coerced.

HELD: The Ninth Circuit Court of Appeals affirmed defendant's conviction. Concerning the *Miranda* issue, the Court acknowledged the well-established rule that once a suspect has asked for counsel, he may not be subjected to further questioning until counsel has been provided, or until the suspect himself initiates further conversation. However, as established by the U.S. Supreme Court in *Davis v. United States* (1994) 512 U.S. 452, this right is not effectively invoked unless the suspect makes a "clear and unambiguous" request for counsel. "Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." A vague or ambiguous reference to an attorney is legally insufficient. In *Davis* itself, the comment, "*Maybe I*

should talk to a lawyer," was found to be ambiguous, thus permitting police to continue questioning; and numerous other cases cited by the Ninth Circuit have found that the words "*I think*" likewise constitute no more than the intent to reflect on, or ponder, the issue and are not sufficient to cause a reasonable police officer to understand that the suspect was in fact asking for an attorney. Thus the Ninth Circuit, while characterizing the question as "close," ruled that Clark's first reference to an attorney ("*I think I would like to talk to a lawyer*") was insufficient to constitute an invocation and require further interrogation to cease. As for Clark's second reference ("*Should I be telling you or should I talk to a lawyer*?"), the Court found that it, too, was inadequate and, indeed, did not even rise to the level of an ambiguous request. Therefore, continued interrogation did not violate defendant's *Miranda* rights in this instance either.

The Ninth Circuit also rejected Clark's "coercion" argument, in which he claimed that the manner in which the police conducted the interrogation (i.e., over 5 hours in a 6-by-8 foot, locked, windowless interrogation room) was coercive, and further that talking about balancing the effects of "*remorse*" with "*fear of punishment*" was somehow an offer of leniency. The Court concluded that the police had not done or said anything, under the totality of the circumstances, which could reasonably be viewed as having "*overborne*" defendant's will, observing that the interrogation room was "unremarkable" in its size and nature, that the length of the detention was likewise not unusual, and that defendant at no time had asked for food, water, or to use the restroom. Similarly, the Court found that the detective's comment about "remorse" reflected only his own, personal *opinion* as opposed to an offer or promise of leniency, implied or otherwise.

NOTE: First, be aware that many cases decided *before* the Supreme Court's *Davis* decision in 1994 would no doubt be decided differently today. In other words, language that some courts earlier viewed as "unequivocal" might well be considered "ambiguous" today. Second, note that the Ninth Circuit correctly distinguished between the *Miranda* issue on the one hand, and the issue of coercive police conduct on the other. As the United States Supreme Court recently clarified in *Chavez v. Martinez* (2003) 123 S.Ct. 1994, these are separate and distinct issues: *Miranda* relates to the *Fifth* Amendment's privilege against self-incrimination, which is a *trial* right, whereas the issue of coercive police conduct must be analyzed under the *Fourteenth* Amendment's due process clause. Lastly, what a pleasant surprise it was to have the Ninth Circuit characterize the officers' conduct in this *Clark* case as "unimpeachable!"

NOTES:

People v. Neal

(2003) 31 Cal.4th 63

SUBJECT: Miranda; Intentional Violations and Involuntariness

RULE: Purposely ignoring an in-custody suspect's repeated attempts to invoke his *Miranda* rights, in combination with other coercive police tactics, violates the suspect's Fourteenth Amendment right to "due process" and, absent a sufficient break in custody, renders his subsequent statements "involuntary" and inadmissible at trial for *any* purpose.

FACTS: In 1999, defendant Neal, an 18-year-old continuation high school dropout, strangled to death 69-year-old Donald Collins, whom Neal had known for many years and with whom he was living in Tulare County at the time; the killing was apparently in response to Collins' unwanted sexual advances. The day after the murder, because police were viewing him at that time only as a possible witness, Neal voluntarily accompanied Detective Martin to a sheriff's substation to be interviewed. Well into the session, Martin noticed and asked about some "fresh marks" on Neal's hands, eventually causing Neal to become so defensive and agitated that he said he was going to leave. Instead, however, Martin advised Neal of his *Miranda* rights and, without obtaining a waiver, continued to question him. Neal soon invoked his right to counsel ("I am ready to talk to my lawyer"), as well as his right to silence ("I am not saying nothing now"). Indeed, Neal expressly asked for a lawyer a total of *nine times*, but Martin simply ignored him and continued to ask questions. At a subsequent court proceeding, Martin acknowledged he knew that his conduct was "improper," but explained he did what he did because he had been taught by a supervisor that it was a "useful tool" to obtain statements from an in-custody suspect—despite the suspect's *Miranda* invocation—for possible use as impeachment at trial. When Neal continued to deny involvement, Martin finally gave up and arrested him. A little later, prior to booking, Martin told Neal that cooperating with him was Neal's "last chance" and that if he cooperated, Martin could "make it as best as I can for you." Martin also told Neal that "the system is going to stick it to you as hard as they can," and that refusing to cooperate was only going to earn him a more serious charge. Neal responded that he would "sleep on it;" and, after being booked and spending the night in jail—allegedly without food, water, access to bathroom facilities, or any contact with non-custodial personnel—he sent word to Martin the next morning that he wanted to see him. At the start of this second interview, Martin *Mirandized* Neal again and obtained a waiver, after which Neal confessed to the murder. Neal confessed a second time during a follow-up interview a few hours later that same day. At his trial, both of these confessions were used against Neal in the People's case-in-chief, and he was convicted of second degree murder. On appeal, the appellate court agreed with the trial court that the confessions were admissible because Neal himself had re-initiated the questioning. Neal then appealed to the California Supreme Court.

HELD: The California Supreme Court *unanimously* reversed, finding that Neal's re-initiation of questioning, *as well as* his two subsequent confessions, were "*involuntary*" and therefore inadmissible for *any* purpose, including impeachment, because they resulted from improper, coercive police tactics which, taken together, denied Neal his constitutional right to "*due process.*" Although Neal did re-initiate the contact with Detective Martin, the Court concluded that he did so because of a combination of coercive factors, including (1) Martin's blatant, deliberate and repeated disregard of *Miranda*, (2) his *promise* to help if Neal cooperated, as well as his *threat* that the "system" would "stick it" to him if he didn't, (3) the deprivation of food, water, bathroom privileges, and contact with any non-custodial personnel while held overnight in a jail cell, and (4) Neal's young age, inexperience, minimal education, and low intelligence, all

of which made him particularly susceptible to these coercive tactics. And, because there was no break in custody during which Neal might have been able to consult with an attorney, free from the pressures of custody, these tactics by the police rendered both his decision to re-initiate questioning, as well as the two resulting confessions, "involuntary" and thus inadmissible for any purpose.

NOTE: It is true that in *People v. Peevy* (1998) 17 Cal.4th 1184, the California Supreme Court upheld the use, *for impeachment purposes only,* of a statement obtained in deliberate violation of *Miranda,* and that *Peevy* has not been overturned. *However, do not take Peevy as an invitation to ignore the dictates of Miranda*. For one thing, the statement obtained in *Peevy*, as both sides agreed in that case, was strictly *voluntary* and *not* obtained through the use of coercive tactics such as the ones employed here. Furthermore, contrary to this case, there was no indication in *Peevy* that the officer's decision to deliberately ignore an invocation of *Miranda* rights (sometimes referred to as questioning a suspect "outside *Miranda*") had been *sanctioned* by his department, i.e., that it was part of "widespread police departmental policy and training"—something which the Supreme Court has consistently indicated it will not tolerate. Indeed, in *Neal*, *Peevy*, and other cases (such as *People v. Bradford* (1997) 14 Cal.4th 1005), this Court has repeatedly characterized the use of this technique as "improper," "unethical," "strongly disapproved," and even "*illegal*"(!), and has hinted that *Miranda* violations stemming from any such widespread practice may cause the Court to create a new rule of suppression. (See *Peevy* at pp.1205-1208.) So, *please*, *do not purposely violate Miranda!!!*

NOTES:

People v. Castille et al

(2003) 108 Cal.App.4th 469

SUBJECT: Joint Interrogation Admissibility

RULE: A joint interrogation is admissible under the "statement of a party admission" and "adoptive admission" exception to the hearsay rule.

FACTS : Remon Shields, and Clemeth Castille, both 17 years old, and Robert Brown, age 18, decided to rob Sharif's Market in Oakland. Shields collected two sawed-off shotguns from the basement of his grandmother's house; a single shot .16-gauge Winchester and a pump-action .12- gauge Mossberg. He then brought the guns to Brown's car. Brown drove all three to the market.

At Shields' direction, Brown parked near the market. Shields and Castille got out of the car. They wore ski masks and pulled hoods over their heads. As both men entered the store, Shields handed Castille the .16-gauge shotgun that fired pellets. Shields carried the .12-gauge Mossberg that fired a slug. Brown remained in the car.

Castille entered the store and approached the clerk at the register, while Shields stood guard at the door, approximately six to eight feet from the counter. During the robbery, the store clerk grabbed Castille's shotgun and a struggle followed. Shields responded by firing two rounds, six or seven seconds apart, killing the store clerk. The defendants then abandoned the robbery attempt and made their escape in the getaway car.

About a month after the shooting, Oakland police arrested Shields, Castille, and Brown for the murder/attempted robbery. Each defendant waived their Miranda rights and was interviewed separately. Upon completion of the individual statements, all three were brought together and a joint interview was conducted. During this interview, the defendants responded to the questions of the interrogating investigators. Several methods were used to include all three defendants in the discussion. The investigators frequently began their questions on a particular topic by addressing one defendant and then continuing the account with another. The defendants confirmed the accuracy of the others' statements and, on occasion, corrected and clarified facts. Significantly, at the conclusion of the joint interview, each expressly adopted the truth of the joint statement. Additionally, each defendant was asked if they wanted to add anything to their statement. With a few minor variations, all three defendants basically agreed upon the same sequence of events. The tape recording of the joint interview was played for the jury. Defendants did not testify at trial and their individual statements were not offered.

The jury convicted Shields and Castille of first degree murder with the special circumstance that the murder occurred during the attempted commission of a robbery. The jury also found that Shields and Castille each used a firearm during the crime. Brown was convicted of the lesser offense of being an accessory. The joint statement proved to be very damaging to the defendants.

The defendants filed an appeal and attacked the admissibility of the joint statement.

HELD: Generally, with multiple suspects, the testimony of a police interrogator concerning anyone defendant's admissions or confession that implicates one or more other defendants will either have to be

"redacted" (edit out the parts that refer to a co- defendant) or not used at all in a jury trial. The other alternatives include having separate trials or using multiple juries in a single trial and neither alternative is beneficial to the prosecution.

The Sixth Amendment's confrontation clause provides: "in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." Generally, a statement made by one defendant that incriminates a co-defendant is not admissible at a joint jury trial. (Bruton v. United States (1968) 391 U.S. 123; People v. Aranda (1965) 63 Cal. 2d 518.) An exception exists, where the defendant who made the statement that incriminates a codefendant testifies at the joint trial and, thus, would be subject to cross-examination like other witnesses. In this case, the defendants did not testify at the joint trial.

The Appellate Court held that the joint interview was admissible under two firmly established and closely related exceptions to the hearsay rule: statements of a party and adoptive admissions..

The statement of a defendant is the most straightforward of the hearsay exceptions (1220 Evidence Code). The statement is only admissible against the party who actually made it. Thus neither Shields nor Castille can successfully object to the admission of their own statements against them. This exception would not serve, however, to allow a statement of Shields to be admitted against Castille or vice versa.

The adoptive admissions exception generally permits hearsay to be admitted against a party, when that party has adopted or agreed that a statement originally made by someone else is true (1221 Evidence Code). Here the interview tape reveals that virtually all statements made by one defendant implicating either or both of the other defendants were adopted by those defendants as true. Each defendant was found to be an active and voluntary participant in the joint interview. Thus, the Appellate Court held that the joint interview was admissible. Conviction upheld

NOTE: A co-defendant's silence during a joint interrogation cannot be used to prove an adoptive admission according to the following recent case: People v. Jennings (Oct. 2, 2003) 2003 DJDAR 11180 (Case not final as of Oct. 2003)

NOTES:

Chavez v. Martinez

(2003) 123 S.Ct. 1994

SUBJECT: Miranda & The Fifth Amendment

RULE: Neither a *Miranda* violation nor coercive interrogation by police constitutes a violation of the *Fifth* Amendment's self-incrimination clause. However, a coercive interrogation might, if it "*shocks the conscience*," be a violation of the *Fourteenth* Amendment's due process clause.

FACTS: While investigating suspected narcotics activity at a vacant lot, Oxnard police officers detained defendant Martinez who was approaching on his bicycle. During the protective patdown which followed, one officer discovered a knife in defendant's waistband and verbally warned his partner. While the first officer tried to handcuff Martinez, Martinez grabbed the officer's gun, and a struggle ensued. The second officer opened fire on defendant, wounding him in the face, spine and legs, resulting in paralyzing injuries and blindness in one eye. A patrol supervisor, Sergeant Chavez, arrived on the scene minutes after the shooting and rode with Martinez, who had been handcuffed and arrested, in the ambulance to the hospital. There, Sgt. Chavez attempted to interview Martinez while trauma personnel treated his wounds, finally obtaining about 10 minutes of substance over a 45-minutes period. Martinez, in considerable pain, repeatedly told Chavez he did not want to talk with him until he received medical treatment. Nevertheless, Chavez persisted, apparently seeking a "dying declaration" by reminding Martinez that he was dying and asking him what led up to the shooting. Martinez, who was never advised of his *Miranda* rights, survived, but no charges were ever filed against him. Later he brought a civil rights suit against Chavez and others in federal court (42 U.S.C. sec. 1983,) claiming that he had been (1) illegally stopped (an issue still pending in the trial court) and (2) subjected to coercive interrogation while receiving medical care. In response to this second issue, Sgt. Chavez argued to the trial court that he was entitled to "qualified immunity" from civil liability. The trial court, however, disagreed and granted Martinez' motion for summary judgment (i.e., found that Chavez civilly liable based upon the pleadings alone). Chavez appealed to the Ninth Circuit, which agreed with the trial court, ruling that Chavez had violated Martinez Fifth Amendment right against self-incrimination as well as his Fourteenth Amendment right to due process. Chavez then petitioned the United States Supreme Court.

HELD: The United States Supreme Court, in a somewhat fractured decision consisting of six separate written opinions (!), reversed two major aspects of the Ninth Circuit's ruling. First, concerning Martinez' *Fifth* Amendment, self-incrimination claim, a majority of the Justices ruled that there had been *no violation* by Sgt. Chavez, either by failing to comply with *Miranda* and/or by engaging in coercive conduct. This was so because at its core, this portion of the Fifth Amendment—which provides that "no person . . . shall be compelled *in any criminal case* to be a witness against himself"—is a *trial* right which is violated *at trial* when a statement obtained in violation of *Miranda* is *admitted into evidence*. Put another way, an interrogator's non-compliance with *Miranda* and/or the manner of asking questions in the field or at the station simply *cannot* constitute a Fifth Amendment self-incrimination violation. Therefore in this case, where no "criminal case" (a term which the Court declined to define) was ever filed against Martinez, there was no *Fifth* Amendment cause of action. Second, a majority of Justices ruled that Martinez' claim of "coercive interrogation" must be adjudicated under the *Fourteenth* Amendment "due process" clause, and further that the proper standard for determining whether there has been a substantive "due process" violation is not whether the police engaged in *any kind* of coercive conduct (i.e., the erroneous standard long used by the Ninth Circuit), but rather whether or not the police conduct was "so brutal and so

offensive to human dignity" as to "*shock the conscience*." Accordingly, a majority of Justices sent the case back to the Ninth Circuit to decide this question under the proper standard, although some of them went on to express their opinion that this higher standard had *not* been met in this case (i.e., that Sgt. Chavez was merely trying to obtain Martinez' version of this police-shooting event before he died, and that Chavez did not interfere with medical treatment), while others concluded exactly the opposite (i.e., that Sgt. Chavez brutally and incessantly continued to harangue Martinez for information despite his repeated pleas to be left alone and receive medical care). (Incidentally, it should come as no surprise that upon receiving the case back from the Supreme Court and returning it to the trial court for resolution of the facts, the Ninth Circuit panel expressed its unanimous opinion that, as portrayed in the pleadings, Chavez' conduct had indeed been "shocking" so as to deny him qualified immunity on the Fourteenth Amendment claim. See *Martinez v. City of Oxnard* (9th Cir. 2003) 337 F.3d 1091.)

NOTE: Overall, this case is clearly good news for law enforcement in the area of civil rights litigation, for it effectively eliminates potential civil liability under the *Fifth* Amendment for any issue involving compliance with *Miranda* and/or coercive questioning. On the other hand, the case should have little effect on officers' training or conduct in the field, for it remains a bad idea to intentionally violate any of *Miranda*'s procedures. *Intentional violations of Miranda should not be encouraged by prosecutors, nor practiced by police officers*. This is particularly true in light of the California Supreme Court's strong and persistent view that an intentional violation of *Miranda* are both "improper" and somehow "unlawful."

Likewise, it is also a bad idea to use coercive tactics (physical or psychological coercion, or threats of promises of leniency, whether direct or indirect) during an interrogation. A statement given in response to *any* coercion by police is "involuntary"and thus *inadmissible into evidence* for any purpose, even though, thanks to this *Chavez* case, you should no longer be potentially liable for money damages in a civil rights suit unless your conduct was *so* coercive as to "*shock the conscience*."

NOTES:

People v. White et al.

(2003) 107 Cal.App.4th 636

SUBJECT: Good Faith Error on Legality of a Traffic Stop

RULE: A police officer's "mistake of law," despite being made in good faith, will invalidate a traffic stop.

FACTS: A California Highway Patrol Officer observed the defendants (White and Fishbain) traveling on Highway 101 with a missing front license plate, an apparent violation of V.C. § 5200. The officer also noticed a tree-shaped air freshener hanging from the rearview mirror, believed by the officer to violate V.C. § 26708(a)(1). The officer made a traffic stop. The rear license plate showed that the car was registered in Arizona. As the officer talked with the driver seated in the car, he noticed the strong odor of burnt marijuana. The officer ordered both defendants from the vehicle and searched it, resulting in recovery of a number of marijuana pipes, $9,230 in cash, and over five pounds of marijuana in 10 heat-sealed packages. Charged with possession of marijuana for sale and transportation of marijuana, both defendants brought motions to suppress the evidence arguing that the officer did not have sufficient legal cause to make a traffic stop, and that the contraband was therefore the product of an illegal stop. The trial court denied the motions. White was convicted by a jury of transportation of marijuana and Fishbain pled guilty to a lesser charge. Both defendants appealed.

HELD: The First District Court of Appeal (Div. 5) reversed, ruling that the defendants' suppression motions should have been granted. As for the air freshener, to be a violation of V.C. § 26708(a)(1), the item has to be "affixed" to the windshield in some manner, which, in this case, it was not. And V.C. § 26708(b), which makes it illegal to obstruct or reduce the driver's clear view, was found not to apply based upon expert testimony that such an air freshener covered only .05% of the total surface of the car's windshield was not enough to "obstruct or reduce" effectively the driver's clear view. As to the license plate violation, California law requires two plates to be on the vehicle if, but only if, there are two plates issued for that vehicle. (See V.C. § 5202) Arizona only issues one license plate for a vehicle. Not being in violation of Arizona's license plate requirements, California law was also not violated. Despite this mistake being made by the officer in good faith, a "good faith mistake of law" (as opposed to a "mistake of fact") does not validate an otherwise unlawful stop. Therefore, The officer did not have any legal cause for stopping the defendants' vehicle. The recovered evidence, being the product of an unlawful traffic stop, should have been suppressed.

NOTE: As to the license plate issue, this is consistent with other cases. (United States v. Twilley (9th Cir. 2000) 222 F.3rd 1092; but see, People v. Glick (1988) 203 Cal.App.3rd 796, where the officer's reasonable good faith but mistaken belief that New Jersey plates were required to have affixed a registration sticker held not to invalidate the stop.) You are required to know another's states license issuing requirements. As to the air freshener, this might have gone the other way had there been some evidence presented by the prosecution to the effect that the air freshener did in fact obstruct or reduce the driver's view. There was nothing, however, presented in court to rebut the defense expert's opinion that it did not. And, maybe it doesn't. But either way, we now have the rule that those dangling air fresheners are legal. So if you've been writing tickets to people for hanging them, or any other small object, from the rearview mirror, be forwarned that it has now been held that you are wrong.

NOTES:

United States v. Colin et al.

(9th Cir. 2002) 314 F.3d 439

SUBJECT: Reasonable Suspicion; Traffic Stops

RULE: Weaving from lane line to lane line for 35 to 45 seconds is neither a violation of the lane straddling statute (Veh. Code, § 21658, subd. (a)) nor reasonable suspicion that the driver may be under the influence.

FACTS: A sergeant observed defendants' Honda traveling at about 70 miles per hour. While following some 75 yards behind the Honda, the sergeant observed it drift onto the solid white fog line on the far right with the vehicle's right-side tires traveling on the line for approximately ten seconds. The Honda then drifted to the left side of the right lane, made a signal, and moved into the left lane. The car then drifted onto the left yellow line with its left wheels traveling on the yellow line for another 10 seconds. The car then moved to the center of the left lane, signaled again for a lane change and moved into the right lane. Suspecting that the driver might be under the influence of alcohol (Veh. Code, § 23152, subd. (a)), and believing that he was at least in violation of Vehicle Code section 21658, subdivision (a) (lane straddling), the sergeant pulled the vehicle over. Co-defendant Estrada-Nava was driving with defendant in the right front passenger seat. The subjects' extreme nervousness and other observations caused the sergeant to suspect that the car was either stolen or that they were transporting narcotics. A consent search from both subjects resulted in recovery of marijuana and methamphetamine. Charged in federal court with possession of methamphetamine with the intent to distribute (21 U.S.C. § 841(a)(1)), both defendants moved to suppress the contraband on the theory that the evidence was recovered as a result of an illegal traffic stop. The trial court denied the defendants' motion.

HELD: The Ninth Circuit Court of Appeals reversed, finding the traffic stop to be illegal under the circumstances. The Court first dissected California's lane-straddling statute, noting that the section requires that the "vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety." There was no evidence that any of the lane changing, or that touching the outside lane lines, was done unsafely. Also, citing authority under similar circumstances from other states, there being no California cases on point, the Ninth Circuit found that driving *on* the outside lines, without crossing over them, did not show that the driver was not "as nearly as practical within a single lane." Defendants, therefore, did not violate section 21658, subdivision (a). As to the driving-under-the-influence (DUI) allegation, the court compared the facts of this case with a prior California decision (*People v. Perez* (1985) 175 Cal.App.3d Supp. 8). In *Perez*, a stop was upheld when an experienced law enforcement officer observed "*pronounced weaving*" for three quarters of a mile, which the Court referred to as a "*substantial distance*." The Court determined that the officer's observation of the co-defendant's weaving in this case, as described above, for only 35 to 45 seconds, fell short of the standard discussed in *Perez* and was not legally sufficient to provide the necessary *reasonable suspicion* justifying the stop. Since the traffic stop was illegal, the results of the consent search should have been suppressed.

NOTE: The Ninth Circuit's interpretation of the *Perez* case demonstrates a selective reading of the case to justify its decision in this case. First, the "*pronounced weaving*" in *Perez* was, in fact, the car "drifting" only two feet in each direction *within its lane*, which may be less weaving than Estrada-Nava did in this case. Second, the Ninth Circuit failed to mention that *Perez* cited four out-of-state cases, all of which

found similar stops to be lawful. Third, the court did not even discuss a later case, *People v. Bracken* (2000) 83 Cal.App.4th Supp. 1, where a traffic stop was upheld when an experienced officer observed a DUI suspect weaving *in his own lane* for only *half a mile*. Fourth, considering Estrada-Nava's speed in this case (70 mph) in conjunction with the time he was observed weaving (35 to 45 seconds), it is apparent that Estrada-Nava was observed weaving *at the very least* for just under three quarters of a mile, as much as, if not more than the defendants in either *Perez* or *Bracken*! Fifth, the Ninth Circuit ignored another issue. The *Perez* Court found (p. 12), and the *Bracken* Court agreed (p. 3), that, if not DUI, an officer has a right to stop the suspect's vehicle if for no other purpose than "to investigate the cause of such weaving as the weaving is also indicative of possible equipment violations." Sixth, the court did not discuss at all what DUI training and experience the sergeant had and whether this training and experience (or lack thereof) affected its decision. *Perez*, and cases cited therein, note that a "court should consider that a trained law enforcement officer be permitted to make inferences and deductions that might well elude an untrained person."

NOTES:

United States v. Fernandez-Castillo

(9th Cir. 2003) 324 F.3d 1114

SUBJECT: Traffic Stops; Reasonable Suspicion

RULE: Information from a known source concerning erratic driving, corroborated by an experienced police officer's own, albeit limited, observations, justified the stop of a vehicle in this case.

FACTS: Montana Department of Transportation (MDOT) employees observed a vehicle weaving from lane to lane, crossing at times the left yellow median line and the right-side fog line, while traveling east-bound towards Miles City. They called this observation into their office, providing information concerning its location, direction of travel, and a detailed description of the vehicle including a partial license number. The MDOT called the Montana Highway Patrol dispatcher with this information, who immediately passed it on to units in the field. Officer Schock received the report of erratic driving, was given a physical description of the vehicle (color, make and model), including the fact that it had North Dakota license plates (although he was not given the partial license number), and was told where it had last been seen and its direction of travel. He was also told that the information had come from an MDOT employee. Officer Schock observed a vehicle matching the description given to him, 18 miles from where it was originally observed, traveling in the direction indicated. The driver was sitting up close to the steering wheel, a behavior that Officer Schock, as a veteran traffic officer with eleven years of experience and hundreds of DUI arrests, associated with impaired driving. Officer Schock observed the car drift in its lane and then make "one rather large movement towards the center line and then back again." As Schock got closer to the car, the driver decided to exit into Miles City. Knowing that there was a stop sign at the end of the off ramp, and believing that the driver constituted a danger to the street traffic, Officer Schock made an immediate traffic stop without personally observing a traffic violation. When he contacted the driver (defendant), Officer Schock could smell the odor of marijuana coming from within the vehicle and saw a piece of ash on defendant's lip. Defendant was detained as an illegal alien. His vehicle was impounded and later searched with a search warrant, resulting in the recovery of some 500 grams of methamphetamine. Defendant argued that he had been stopped without sufficient cause, but his motion to suppress the evidence was denied.

HELD: The Ninth Circuit Court of Appeal, in a split, 2-to-1 decision, affirmed. A traffic stop is lawful if supported by a "*reasonable suspicion*." The issue here was whether the second-hand information from unidentified MDOT employees, plus the officer's limited personal observations, was sufficient to constitute a reasonable suspicion that the driver was impaired. "For a third party report of suspected criminal activity to form the basis of an officer's reasonable suspicion, that report must possess sufficient indicia of reliability." The majority first indicated that the report was not from an anonymous source because Officer Schock received, via the Highway Patrol dispatcher, information from MDOT employees whose specific identities were easily ascertainable. Officer Schock knew all the MDOT employees in his area and knew that information they had provided in the past was accurate. Also, although the Highway Patrol dispatcher did not pass on all the information she had received (e.g., the partial license plate number), the Court considered that information to be part of the "*collective information*" known to law enforcement at the time of the stop. However, even if the court were to consider the source of the report of the erratic driving as anonymous, it gave the report due weight because it possessed several indicia of reliability. Officer Schock found the car, which matched the *detailed* broadcast description, in the place he would have expected to find it given the information he had received concerning its location and direction of travel.

The "*contemporaneous nature*" of the report added to its trustworthiness. Officer Schock's observations (defendant sitting up close to the steering wheel and the pronounced weaving within the lane) corroborated the information he had received from MDOT concerning the defendant's erratic driving. All these circumstances, considered in their totality, added up to a reasonable suspicion that the driver was impaired.

NOTE: The majority, although impressed by the number and accuracy of the specific details reported by a known (or readily ascertainable) source, noted that the MDOT information alone would not have been enough. However, the officer's limited personal observations, when considered in light of his extensive training and experience, provided sufficient corroboration. The dissenting opinion disagreed, finding that the MDOT information should have been treated as from an anonymous source. The dissent also believed that the information should be given little value because it was not sufficiently detailed or predictive to allow Officer Schock to test the tip's reliability.

NOTES:

People v. Medina

(2003) 110 Cal.App.4th 171

SUBJECT: Traffic Stops and Detentions

RULE: A traffic stop for an equipment violation in a "high crime" (i.e., gang) area at night is not reasonable suspicion sufficient to justify a detention or patdown for weapons.

FACTS: Two Los Angeles police officers stopped defendant's vehicle due to a broken taillight, at night. Defendant was ordered out of his vehicle, and he complied. He was then told to put his hands behind his head and walk backwards towards the officers, and then to face an adjacent wall. He again complied. Although having no specific reason to believe defendant was armed, other than the nature of the area and the time of night, one officer decided to search him because they were in a "high crime location." The officer grabbed defendant's hands and asked him whether he had any weapons, sharp objects, "or anything he should know of prior to the search." Defendant responded that he had a "rock" (i.e., cocaine) in his pocket. Rock cocaine was recovered from his pocket, with some more being found in his car. Defendant's motion to suppress the cocaine was denied, and he pled guilty. Defendant appealed.

HELD: The Second Circuit Court of Appeal (Div. 6) reversed, finding the detention and search to be illegal. The Court rejected the People's argument that the search of defendant's person was prompted by his admitting to having a "rock" on his person. Defendant's comment was the product of his being detained (i.e., forced to face a wall and having his hands held behind his head by the officer). The officer's sole reason for detaining and preparing to pat defendant down was because of the time of night and the location. "Apparently, anyone observed to be driving in that area at night with a citable equipment defect would be stopped and subjected to a patdown search. The Fourth Amendment plainly prohibits the police from employing such a procedure." While the traffic stop was legal, "a driver stopped for a minor traffic infraction cannot be physically restrained absent 'specific and articulable facts' that could support a rational suspicion that (he was) involved in some activity relating to crime.'" Here, the officer was merely following what he said was his "standard procedure." While being in a so-called "high crime" area, as well as the time of night, are both factors a police officer may consider when determining whether there is sufficient cause to detain and/or pat someone down for weapons, there must also be other articulable suspicious circumstances. These two factors alone are not enough. The cocaine and defendant's statements were the product of an illegal detention and search, and should have been suppressed.

NOTE: This is no real surprise. A police officer must ask him or herself in such a situation: "Is there anything about this particular person that makes him more suspicious than everyone else out at that particular location at that particular time?" This is what the courts are talking about when they tell us we must have some "particularized suspicion" to justify a detention and/or patdown. This rule protects the many good people who have to live in high crime areas and travel at night. They should not have to be subjected to detentions and searches every time they go out just because they are in a particular area at a particular time of day or night.

NOTES:

Kaupp v. Texas

(2003) 123 S.Ct. 1843

SUBJECT: Illegal Arrest; Confession as the Product of

RULE: Transporting a criminal suspect without the suspect's consent is an arrest, and illegal if done without probable cause to arrest.

FACTS: A 14-year-old girl disappeared in January of 1999 in Harris County, Texas. An investigation led to the victim's 19-year-old half-brother and his friend, the 17-year-old defendant. After flunking a polygraph test three times, the half-brother eventually confessed to having stabbed his half-sister to death and dumping her body in a drainage ditch, but he stated that defendant had also participated in the murder. Despite knowing that they lacked probable cause to arrest defendant (the statements of a co-conspirator implicating another are generally insufficient, by themselves, to constitute probable cause), three detectives and three uniformed officers went to defendant's home at 3:00 a.m. where, after being admitted into the house by defendant's father, they entered defendant's bedroom and woke him up. One detective told defendant, "*We need to go and talk,*" to which he responded simply "*okay*." Defendant was then handcuffed and, in his underwear, led to a police car. The officers first drove him by the drainage ditch where the victim's body had been recovered, then to the police station. At the station, they removed his handcuffs, placed him in an interrogation room, advised him per *Miranda,* and, after obtaining an express waiver, interrogated him. Defendant eventually made some admissions which were later used against him at trial. He was convicted and sentenced to 55 years in prison. On appeal, noting that it was the practice of the Sheriff's Department to "routinely" handcuff people they transported for safety reasons, the Texas appellate court ruled that defendant had gone with the detectives to the police station *voluntarily*, and that therefore he had not been arrested until *after* he made his statements. Accordingly, the appellate court affirmed defendant's conviction. The case then went to the United States Supreme Court.

HELD: The United States Supreme Court reversed, finding that defendant's statements were the product of an illegal arrest and therefore should have been suppressed. All parties agreed that the officers did not have probable cause to arrest defendant when they took him from his home. The only issue was whether, under the circumstances, he had in effect been arrested at that time. The Court ruled that despite defendant's response of "*okay*," it was obvious, in light of all the circumstances, that he didn't really feel like he was being offered a choice, but rather was *involuntarily* submitting to the officers' authority. It is not necessary for a person to physically or verbally resist in order for a lack of consent to be found. In the Court's unanimous view, rousting a 17-year-old minor out of his bed and taking him from his home in handcuffs, wearing nothing more than his underwear, at 3:00 a.m. in January, driving him past the homicide scene and then directly to a police station interrogation room where he was accused of murder, clearly amounted to an arrest. And because this was done *without probable cause*, it was an *illegal* arrest. As the Supreme Court put it, "we have never 'sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization.' (Citation)" Furthermore, defendant's subsequent waiver of his *Miranda* rights was insufficient, by itself, to "*attenuate the taint*" of the illegal arrest, and there were no other intervening circumstances. Therefore defendant's statements should have been suppressed as the product of the illegal arrest.

NOTE: The result in this case should not come as a surprise. In fact, the result no doubt would have been the same even *without* the dramatic circumstances that existed here, because the basic rule is very straightforward: Unless the suspect goes with police *voluntarily*, there will be an illegal arrest, absent probable cause. Nevertheless, possibly from watching too many cop shows on TV, it seems like some law enforcement officers have fallen into the bad habit of taking just about any uncooperative suspect, or even just a witness, to "the house" for questioning, sometimes without probable cause. *Don't do that!* To put it another way, "*detention + nonconsensual transportation = arrest.*" And if the arrest is not supported by probable cause, it more than likely is an *illegal* arrest, which will typically *taint any evidence subsequently obtained.* So, if you are not sure in any particular case whether you have sufficient probable cause to justify an arrest, be sure to first obtain the suspect's *valid, voluntary consent* to go with you. That way, you won't be risking the loss of any resulting evidence.

NOTES:

United States v. Bradley

(9th Cir. 2003) 321 F.3d 1212

SUBJECT: Residential Welfare Check - Community Caretaking Function

RULE: Entering a residence to check on the welfare of a nine-year-old child reasonably believed to have been left home alone at night is a lawful function of law enforcement's "community caretaking function."

FACTS: At approximately 1 a.m., on May 20, 2001, the police lawfully traffic stopped Bradley as he was driving with his girlfriend, Tammy Williams, and her two-year-old daughter. A consent search revealed methamphetamine in the car and in Williams' purse. Deputy Sheriff Wetzel arrested both Bradley and Williams, and took Williams' daughter into protective custody.

Deputy Wetzel knew from a previous incident that Williams also had a nine~year-old son. The deputy asked Williams where her son Christopher was and she told him that he was "at home with a friend." The deputy, along with another officer, went to the home where Williams and Bradley resided. They knocked on the front door, but nobody responded.

The deputy then contacted the officers who were transporting Williams and asked her again where her son was. This time she said he was across the street with a neighbor. The two deputies went across the street and woke the neighbor, who told them that he did not have Christopher. The deputies returned to Williams' house and knocked again on the front door, but nobody responded. They then went around to the back of the house, where they found the door unlocked. The deputies opened the back door, announced themselves, and walked into the house. At that time, Christopher came out of the front room.

Deputy Wetzel walked Christopher to his bedroom to help him get dressed so he could be taken into protective custody. As he went through the house, Deputy Wetzel observed a cash register, with a severed electrical cord, that looked as if it belonged in a retail gun store. He also observed a cup with hypodermic needles sticking out of it sitting on a desk.

A patrol supervisor drove Christopher to a receiving home, meanwhile, Deputy Wetzel phoned in his observations to a detective, who used the information to obtain a search warrant to search for the cash register and other drug evidence. After the search warrant was signed, Deputy Wetzel and other officers began to search the residence. One of the items the search revealed was a firearm in a drawer in the master bedroom. Because Bradley had previous felony convictions, he was indicted for a federal firearm violation-18 U.S.C. 922(g)(1).

Bradley appealed his conviction and challenged the initial entry by the sheriff's deputies, into his home.

HELD: The emergency search doctrine is derived from a police officers' community caretaking function. The Supreme Court has previously recognized the right of the police to respond to emergencies. Also, the Court has held that an entry or search that would otherwise be barred by the Fourth Amendment may be justified by the need to protect life or avoid serious injury.

The appropriateness of the emergency doctrine is best understood in light of the particular facts of a case in which it is invoked. The officers here knew that Christopher's mother was not caring for him, and they

could not locate him in the places she said he was. They were also unaware of the safety conditions inside the house. The possibility of a nine-year-old child in a house in the middle of the night without the supervision of any responsible adult is a situation requiring immediate police assistance.
In this case, the officers acted out of a genuine concern for Christopher's welfare. Deputy Wetzel specifically testified that he entered the house to determine if Christopher was being supervised by a responsible adult. Additionally, before the officers entered the house, they took several other steps. They knocked at the front door first, asked Williams again where Christopher was, and went across the street to wake up a neighbor and ask him about the boy. The evidence supports the finding that the officers' entry was motivated by a concern for Christopher's welfare. Thus, the Court held that the officers' entry into the home was lawful. Conviction upheld

NOTE: The police conducted a reasonable and detailed inquiry in this initial residential welfare check investigation.

NOTES:

United States v. Gorman

(9th Cir. 2002) 314 F.3d 1105

SUBJECT: Residences; Executing an Arrest Warrant

RULE: Officers may enter a home to make an arrest, pursuant to an arrest warrant, when they have "reason to believe" the person named on the warrant is inside. "Reason to believe" is the same standard of reasonableness inherent in probable cause.

FACTS: San Diego police officers had information that a subject named "Kenny" was stealing mail using mailbox keys. The informant directed police to a van belonging to defendant where a couple people were living. The occupants of that vehicle were contacted. They identified defendant as Clarence Kenneth Gorman. They told police that defendant was living with a girlfriend named "Helen." A records check revealed that defendant had an outstanding federal felony arrest warrant stemming from a violation of his conditions of release from a prior mail stealing case. It was also determined that his girlfriend was Helen Vestle, and that she lived at a particular address in San Diego. Armed with the above information, but without a search warrant, officers went to Helen's house at about 4:30 one morning. Defendant's other vehicle was parked in front of the house. The officers waited until about 5:30 a.m. before going to the front door and knocking. Helen eventually woke up and answered the door. She later testified that in response to the officers' questions about defendant, she denied that he was there. The officers testified that she told them defendant was inside asleep. Either way, the officers made entry and arrested defendant at gunpoint. Three mailbox keys and several checks belonging to other people were found in the room. A plastic bag of other people's checks was found in his car. Charged in federal court with possession of a postal key and stolen mail (18 U.S.C. §§ 1704, 1708), defendant's motion to suppress the evidence was denied even though the judge, apparently disbelieving the officers' testimony that Helen admitted to defendant being there, found that the officers had no more than a reasonable suspicion to believe that defendant was in the house. Defendant entered a conditional plea of guilty and appealed.

HELD: The Ninth Circuit Court of Appeal reversed. The issue was whether an officer needs "probable cause" or only "reasonable suspicion" that a person is in a third party's house in order to lawfully make entry to execute an arrest warrant. Accepting the trial judge's conclusion that the officers had only a reasonable suspicion to believe defendant was inside (i.e., informant information that defendant was living with someone named Helen, and defendant's car parked out front this particular Helen's house), the Ninth Circuit found that full-blown probable cause is required. The United States Supreme Court has previously determined that to lawfully enter a house to arrest someone, the officers would need "a reason to believe" the wanted person was in fact there. (Peyton v. New York (1980) 445 U.S. 573, 603.) But neither Peyton nor any subsequent case has ever attempted to define the phrase; "reason to believe." Citing the multitude of cases using this "reason to believe" standard, and noting some relevant language in a dissenting opinion in Steagald v. United States (1981) 451 U.S. 204, the Court finally concluded that having a "reason to believe" meant that the officers were required to have "probable cause" to believe the subject of the arrest warrant was inside before making a non-consensual entry. Therefore, because the officers here did not have probable cause to believe defendant was in Helen's house at the time, the entry was illegal.

NOTE: The Ninth Circuit did not discuss the normal requirement that you need a search warrant as a legal prerequisite to execute an arrest warrant in a third-person's home, per Steagald, except to say that

not having probable cause to believe Gorman was in his girlfriend's house, the officers would not have been able to obtain one anyway. Defendant, as a quasi-permanent guest in his girlfriend's home, certainly had standing to contest the entry. In that the Supreme Court, in Steagald, says that a search warrant is needed to serve an arrest warrant in a third party's house, and because a search warrant must always be supported by "probable cause" (See also P.C. § 1524(a)(6)), this decision is no surprise. The Ninth Circuit also hints very clearly here the same standard would apply for law enforcement to enter the suspect's own home. (See also United States v. Phillips (9th Cir. 1974) 497 F.3rd 1131.) On the other hand, state authority finds that "reasonable belief," or a "strong reason to believe" that the subject is home, either of which is described by the appellate court as something less than "probable cause," is all that's necessary to justify an entry into the defendant's own home. (People v. White (1986) 183 Cal.App.3rd 1199.)

NOTES:

United States v. Enslin

(9th Cir. 2003) 327 F.3d 788

SUBJECT: Residence, Consent Search & Suspect Detention

RULE: (1) Absent unusual circumstances, a homeowner has apparent authority to consent to a search of the entire residence; (2) a command for a suspect to show his hands creates a detention, but it may nevertheless be reasonable, despite no suspicion of criminal activity, to ensure officer safety.

FACTS: Seven U.S. marshals, acting on a tip that fugitive Mickey Bass sometimes frequented the home of John and Shannon Palacios, approached the Palacios house with a warrant for Bass' arrest. When a woman who identified herself as Shannon Palacios came to the door and told the marshals that Bass was not present, they asked for permission to search the house for him, which she gave. After the marshals entered the house, two of them proceeded to a back bedroom, which had a key lock but was not locked. Inside, they found Enslin in bed, apparently having just awakened. Because Enslin's hands were concealed under the covers, and because of concern for their safety while searching the bedroom for Bass, the marshals ordered Enslin to show his hands. As he did so, Enslin's movement revealed a gun in the bed next to him, which ultimately resulted in his arrest. It turned out that three months earlier, Shannon Palacios had rented the back bedroom to a man named Dicker, but that when she subsequently had trouble getting Dicker to leave, she had enlisted the help of Enslin, a parolee who was staying in Dicker's room at her request. At his trial, Enslin argued that the gun should have been suppressed for two reasons: (1) the marshals' warrantless entry into the bedroom was illegal because Shannon Palacios did not have authority to consent to its search, and (2) the marshals' order for Enslin to show his hands converted the encounter into a detention, which was illegal because it was not supported by reasonable suspicion. The federal trial court denied the motion, and Enslin was convicted. He then appealed to the Ninth Circuit.

HELD: The Ninth Circuit Court of Appeals affirmed Enslin's conviction. Concerning the consent issue, the Court ruled that if Shannon Palacios did not have "actual" authority to consent to a search of the back bedroom (a question which the Court did not decide one way or the other), she had "apparent" authority. In other words, it was reasonable for the officers to rely on her consent because (1) she identified herself as Shannon Palacios at the door, (2) the marshals knew that it was the Palacois' residence, (3) she gave consent for them to search the house without any limitation as to scope or her authority, and (4) although the back bedroom had a lock, it was not actually locked at the time at the time of entry, and the marshals had no knowledge that it had ever been rented out.

Concerning the order for Enslin to show his hands, the Court concluded that it constituted a "seizure" in that, under the circumstances, Enslin would reasonably have believed that he had no choice except to comply. However, the Court further ruled that the seizure (detention) was brief, consisted of a very minor ("*de minimus")* intrusion, and, most importantly, was *reasonable* in light of the officers' legitimate concern for their safety while searching an unfamiliar residence for a fugitive. "[B]eing required to show one's hands is simply too small an intrusion into Enslin's liberty to overcome the weighty interest in protecting officer safety."

NOTE: A valid consent to search a suspect's residence or other place or property may be given by a suspect's spouse, roommate, parent, child, or other person, so long as it is reasonable for the officer(s) to

believe that the person giving consent has "common authority" over the area or thing, i.e., has a right to "joint access or control." As for ordering a person to keep his or her hands in view, it constitutes a detention (seizure) anytime you exert or assert authority over someone in a manner that causes the person to reasonably believe that he or she must comply with your order. This case holds, however, that such a command can be reasonable (thus making the "seizure" constitutionally permissible *without* the usual requirement of reasonable suspicion of criminal activity), given the minor nature of the intrusion, in situations where there is legitimate concern for officer safety.

NOTES:

United States v. Davis

(9th Cir. 2003) 332 F.3d 1163

SUBJECT: Third Party Consent to Search

RULE: A warrantless consent search of a room of a residence and its containers without evidence to support a finding that the person giving consent had actual or apparent authority over the room and/or container is illegal.

FACTS: Investigating a Russian roulette-related shooting death, Sparks, Nevada, police officers were looking for defendant, a convicted felon, who they had reason to believe was a witness. They contacted defendant's girlfriend, Jessica McMannis, at her place of employment. Although McMannis shared her apartment bedroom with defendant, she lied and told the officers she didn't know where he lived. As soon as the police left, McMannis called Stephanie Smith, the co-signer on McMannis's lease who occupied the second bedroom in the apartment, and told her not to let the police in. However, Smith not only allowed the police to enter, but also signed a written consent-to-search and told them defendant shared the other bedroom with McMannis, and that defendant's belongings were there. Upon searching the bedroom, defendant's belongings were found. A black gym bag was found under the bed. A shotgun was found in the bag. One of the officers left his business card for defendant with instructions to call him. Four hours later, defendant came to the police station and, although not under arrest, submitted to questioning. Defendant admitted to possessing the shotgun. Defendant was released and not arrested until three weeks later. He was subsequently charged in federal court with being a felon in possession of a firearm (18 U.S.C. §§ 922(g)(1) & 924(a)(2)). Defendant's motions to suppress the shotgun and his resulting statements were denied. He pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeal reversed. Before a person may even challenge a law enforcement search, he must first prove that he has "standing." In other words, he must show that it was his own "reasonable expectation of privacy" that was intruded upon. Even though the evidence indicated that defendant was only an occasional guest at his girlfriend's apartment, the Court found that he did have "standing" to challenge the search. Even an "overnight guest" has a sufficient expectation of privacy in the place he is visiting to give him standing. And he also had standing to challenge the warrantless search of his gym bag. "'A person has an expectation of privacy in his or her private, closed containers' and 'does not forfeit that expectation of privacy merely because the container is located in a place that is not controlled exclusively by the container's owner.'" Smith's signed consent-to-search did not justify the warrantless entry of the bedroom nor the opening and searching of defendant's gym bag absent "actual" or "apparent authority" to give such consent. To show that Smith had such authority to consent to the search, it must be proved that defendant either expressly gave her that authority, or that she had the mutual use and joint access to the place or thing searched, or that the officers at least reasonably believed, under the circumstances, that she had such authority. There was no evidence to support any of these theories in this case. Smith told the officers that it was defendant's property in that room, where it was separate from her own. The shotgun, therefore, should have been suppressed, as should have his later admissions which, under the circumstances, were the direct product of the illegal search of the gym bag.

NOTE: This decision is hard to argue with. It should have been clear to these officers that Smith did not have authority to consent to the search of either McMannis's (and thus defendant's) room, or defendant's

gym bag. This type of situation just screams “search warrant,” although, because defendant was being sought merely as a “witness” at that point, there does not appear to be any facts that would have justified the necessary finding of probable cause to obtain a search warrant.

NOTES:

United States v. Elliott

(9th Cir. 2003) 322 F.3d 710

SUBJECT: Search Warrants; Omitted and Misstated Information

RULE: It is reasonable to believe that a person who traffics in narcotics will have more drugs and other evidence on his person even if the person is never seen in actual physical possession of the drugs.

RULE: Information detracting from the credibility of an informant, such as whether the informant has suffered convictions bearing on dishonesty, should be included in an affidavit. However, even an intentional omission or misstatement may not be fatal if there still exists probable cause in the warrant despite the omission or misstatement.

FACTS: A police officer obtained a narcotics-related search warrant for defendant's residence, listing defendant's residence, ***the defendant himself***, and two others as the place and persons to be searched. The probable cause as described in the warrant affidavit was based primarily on information from a confidential informant. The affidavit stated that informant had said that he saw defendant and the other residents "*in possession*" of methamphetamine at the residence. The affidavit specified that the informant provided information to the police "in hopes of receiving unspecified consideration on current charges" pending against him. The affidavit noted the informant had recently provided information leading to the arrest of at least six persons on felony drug charges and the seizure of drugs. The affidavit stated that the informant had numerous arrests of his own but none of them were for crimes related to false information to police or for perjury. The affiant opined that, based on his training and experience, it is common for persons involved in the illegal manufacture, delivery and possession of controlled substances, to keep such substances and related evidence in their homes, ***on their person*** and in their vehicles. The warrant authorized the searches of the persons listed "regardless of whether they were at the [target]. . . residence." When the warrant was executed, defendant was not home. He was later located at someone else's house where he was searched and found to be possession of a firearm. After being charged in federal court with being an armed career criminal, defendant filed a motion to suppress. Evidence presented at the suppression hearing indicated that (i) the informant had actually seen the methamphetamine in the immediate presence of each of the residents, rather then in the actual physical possession of any one of them; (ii) the benefits the informant hoped to get were *not* "unspecified" but were, in fact, known to the affiant; (iii) the informant had 14 prior "convictions," not merely "arrests;" and (iv) the informant had been arrested once for forgery - a crime of dishonesty. The magistrate was not told any of this information. However, the defendant's motion to suppress was denied. He appealed from his conviction arguing that (1) the warrant affidavit contained false information concerning the informant, and (2) there was insufficient probable cause for a search of his person when found away from his home.

HELD: The Ninth Circuit Court of Appeal affirmed defendant's conviction. The court ruled that the affiant's opinion that people trafficking in narcotics will often have more drugs and other evidence on their person, based upon an affiant's training and experience, is legally sufficient to provide the necessary probable cause to justify the search of defendant's person no matter where he is. "A magistrate is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense." The court also found there was sufficient probable cause in the affidavit. The court noted that in evaluating an affidavit to a search warrant, the reviewing court must determine whether there were any intentional or reckless misstatements. If there were, the misstatements

are to be removed from the affidavit and the affidavit retested for probable cause. The court first held that describing the residents in the house as being in "*possession*" of the methamphetamine was not inaccurate. "*Possession*" is shown where someone knows of its presence and has physical control over it, or has the power and intention to control it. That was shown here. Secondly, the court agreed that the affiant should have specifically listed defendant's forgery arrest, being a crime of dishonesty. However, there was enough other evidence of the informant's reliability to establish probable cause to overcome this omission and all the other deficiencies in the affidavit as described above.

NOTE: Most of the issues in this case could have been avoided with a little more care in the writing of the affidavit. Using vague language in an attempt to hide potentially adverse information can cause more problems than it solves. The court did not even discuss the failure of the affiant to properly describe the informant's criminal history as "convictions" rather than "arrests," and skipped over a couple of the defendant's other complaints. But certainly his forgery arrest should have been listed as "any crime involving dishonesty necessarily has an adverse effect on an informant's credibility." Anything with a potential for such an "*adverse effect*" on the magistrate's decision needs to be addressed head-on in the warrant affidavit. Also, describing in the affidavit how the informant had seen the defendant and the others in "*possession*" of methamphetamine is a perfect example of the problems caused by using "*conclusionary*" language as opposed to a detailed "*factual*" description of what was actually seen.

NOTES:

People v. Pressey

(2002) 102 Cal.App.4th 1178

SUBJECT: Search Warrants; Probable Cause based on Narcotics Possession Alone

RULE: Simple possession of a controlled substance *is not* probable cause that the subject has more contraband in his home, despite an expert officer's opinion to the contrary.

FACTS: Two Napa narcotics officers were riding in an unmarked police vehicle when they noticed defendant driving erratically. At their request, an officer in a marked police unit pulled over the defendant. Defendant, apparently doing a little smoking and doping in the car, was determined to be under the influence of marijuana and a "central nervous system stimulant." The defendant and his vehicle was searched incident to his arrest. The police recovered a marijuana cigarette in his ashtray and 1.5 grams of methamphetamine in a glass vial on his person. Based upon the recovery of these items, the narcotics officer sought a search warrant for defendant's nearby residence. In the warrant affidavit, the officer noted his five years experience as a police officer and 2½ years working in narcotics. He expressed the opinion that "persons involved in the use and transportation of methamphetamine and marijuana will normally have most if not all of [various enumerated] items of evidence [associated with the use, storage, and transportation of methamphetamine and marijuana] within their temporary or permanent residences . . . (and) will keep additional quantities of controlled substances and narcotics at their residence in addition to what they carry on their person . . . ." A judge agreed and issued the warrant. Execution of the warrant at defendant's residence resulted in recovery of more methamphetamine and marijuana along with evidence of the sales of such substances. Defendant's motion to suppress this evidence was denied by the trial judge. Defendant pled "no contest" to the possession for sales of methamphetamine and appealed.

HELD: The appellate court agreed with defendant that the simple possession of a controlled substance on one's person *is not* probable cause to search his residence. While there is good authority for the proposition that the arrest of a particular person for dealing in drugs, plus an expert law enforcement officer's opinion that evidence of that enterprise is likely to be found in the dealer's home, *is* sufficient probable cause to justify the issuance of a search warrant for that person's home (*People v. Cleland* (1990) 225 Cal.App.3rd 388.), the same is not true in the case of simple possession. The court noted that allowing wholesale searches of homes based upon no more than the mere simple possession of contraband, even when bolstered with an experienced officer's opinion, would greatly dilute the important privacy right in one's home. The search warrant for the defendant's residence, therefore, was not supported by probable cause. However, because there was no prior case law on this issue, the officer acted in reasonable good faith in this case and defendant's conviction was upheld.

NOTE: The court's holding will prevent officers from relying on the good faith doctrine to save a warrant under similar circumstances in the future. However, after spending several pages telling us how a warrant like the one in this case won't pass muster, the court stated: "This does not mean that probable cause to search a home could never arise from the particularized suspicions of an experienced narcotics officer, or the circumstances of an arrest for drug possession, only that illegal drug use *does not necessarily* provide probable cause to search the user's residence, and that such cases must be decided on their own facts."

NOTES:

People v. Garcia

(2003) 111 Cal.App.4th 715

SUBJECT: Search Warrants for Businesses Where Drugs Sold

RULE: Knowing that a person is selling contraband from a business, when the seller is *not* an employee or owner of the business, *does not* establish probable cause to believe that more contraband will be found in the business.

FACTS: A sheriff's deputy who was a "controlled substance expert" received information from a confidential reliable informant (CRI) that a person named Paula Conner (*not* the defendant in this case) was selling methamphetamine from both a bar and from Conner's residence. The informant told the detective that he/she had purchased methamphetamine from Conner on numerous occasions at both locations. A controlled buy was conducted at Conner's residence. Deputies also saw Conner inside the bar speaking to patrons. All this information was included in a search warrant for both the residence and the bar along with information that Conner had two prior convictions for possession of controlled substances for sale. Also included in the affidavit was the deputy sheriff/affiant's expert opinion, that Conner (who was not an employee of the bar), was selling methamphetamine from both locations and would be expected to have contraband stored at both locations. When the warrant was executed at the bar, methamphetamine and a glass pipe were found in the bartender's possession. The bartender ended up being the defendant in this case. The defendant brought a motion to suppress the evidence recovered from her person arguing that there was insufficient probable cause in the warrant to justify the search of the bar. The trial court denied her motion and, after pleading "*no contest*," the defendant appealed.

HELD: There was insufficient evidence to establish probable cause to search the bar. The law is clear that a right of access to a residence by a seller of narcotics leads to a reasonable inference that the seller will store the contraband at that residence. The same rule applies to a business. But the seller must be an employee or owner of the business, or have a close enough connection with an owner or employee that they would allow the customer to store the drugs in the bar. Absent specific information that a customer is actually storing drugs in a business; *mere access alone is not enough*. Conner was not an employee or owner of the bar and there was no specific facts showing Conner was anything more than a patron of the bar. The fact Conner sold drugs from the bar, by itself, does not provide probable cause to justify the conclusion that she must also be storing her contraband in the bar. Therefore, the search warrant for the bar should not have been issued. Defendant's conviction, nevertheless, was affirmed under the good faith doctrine because there was no previous case law in the area and the officer made significant efforts to develop probable cause.

NOTE: The court's holding will prevent officers from relying on the good faith doctrine to save a warrant under similar circumstances in the future. Catch a dope dealer on the street, and you have probable cause to believe he has evidence of this illegal activity *in his home*. (*People v. Cleland* (1990) 225 Cal.App.3rd 388.) This will commonly justify the issuance of what is sometimes referred to as a "*Cleland Warrant*" to search the dope-dealer's home. But there has to be a sufficient "*nexus*" between the evidence you have of dope-dealing and the particular place you want to search. Just being a bar patron, or even someone who is selling dope from a business open to the public such as a bar, is not sufficient evidence by itself to justify the conclusion that she stores her wares in that bar.

NOTES:

People v. Hulland

(2003) 110 Cal.App.4th 1646

SUBJECT: Search Warrants and Stale Information

RULE: A 52-day delay between a controlled buy of narcotics and the execution of a search warrant, without evidence of any continued drug dealing, invalidates the warrant based upon the *staleness* of the information. "*Good faith*" will not save it.

FACTS: A police officer received information from a "confidential reliable informant" ("CRI") that defendant was selling marijuana, and that he lived in a particular apartment on Crenshaw Blvd., in Los Angeles. The officer made a controlled purchase of just under a pound of marijuana from the defendant sometime between September 21 and 30, 2001. DMV records, postal information and surveillance by the officer verified that defendant lived at the Crenshaw address provided by the CRI. There was also some indication that defendant had a second address, which turned out to be incorrect. The officer obtained a search warrant, using the controlled buy and the original information from the CRI as his "probable cause." The warrant was executed at the Crenshaw address on November 15th - 52 days after the controlled buy. Marijuana, rock cocaine, money, firearms and other paraphernalia were recovered. Defendant's made a motion to suppress the evidence, arguing that the information in the warrant affidavit was "*stale*." The motion was denied, the trial court ruling that the officer's "good faith" saved the otherwise stale warrant. Defendant pled "no contest" and appealed.

HELD: Information in a search warrant affidavit will be deemed stale unless it consists of facts so closely related to the time of the issuance of the warrant that it justifies a finding of probable cause at that time. In this case, the officer testified that in his expert opinion, a person who sold just under a pound of marijuana would still have contraband in his residence. The appellate court disagreed and reversed the conviction. In the absence of evidence of continued narcotics activity, particularly when we are trying to justify a search warrant on a residence based upon a controlled purchase of narcotics that took place in a parking lot in another city, 52 days is too long. Anything over four weeks is generally considered insufficient to demonstrate present probable cause. The fact that the officer used at least some of this 52 days trying to determine the validity of the second address did not justify the length of the delay. The court found it was objectively unreasonable to opine that someone who sold almost a pound of marijuana would still have contraband in his apartment for up to two months. Thus, the officer's "*good faith*" did not save the warrant.

NOTE: You can overcome the staleness argument by showing a history of drug dealing over some significant period of time, which should establish the necessary probable cause when added to your expert opinion that a drug dealer, in your training and experience, will continue to work out of his residence for months, if not longer, particularly when not interrupted by an arrest. In this case, the officer attempted to recontact the defendant, but found his phone and pager to be disconnected, probably to set up another buy, which would have cured the staleness problem. In hindsight, waiting a little longer until a second controlled buy could have been arranged would have been the better tactic to take.

NOTES:

United States v. Vesikuru

(9th Cir. 2002) 314 F.3d 1116

SUBJECT: Anticipatory Search Warrants

RULE: The triggering events (conditions precedent) necessary for the validity of an anticipatory search warrant may be in a warrant's affidavit that is incorporated into the warrant itself.

FACTS: California Bureau of Narcotics Enforcement (BNE) agents discovered 32 fluid ounces of phencyclidine (PCP) in a package at a retail mail center after a drug-sniffing dog alerted on the package and a search warrant was obtained authorizing the opening of the package. The package was addressed to a West Seattle, Washington, address. BNE notified authorities in West Seattle. Drug Enforcement Administration (DEA) agents and Seattle police put together a similar appearing package in preparation for a controlled delivery to the address. A state court "anticipatory Search Warrant" was requested, which included permission to place a radio transmitter inside the package that would alert the surveillance team when someone opened it. An affidavit was prepared by the officers which, after describing their probable cause to believe the package was to be delivered to the target address, requested the court's authorization to enter the listed address upon the package being accepted and the agents "observ(ing) the package being taken into the residence," or when the radio transmitter is activated. The warrant form itself failed to describe the conditions precedent for entering and searching the residence, but did indicate on its face that probable cause to search was based "[u]pon the sworn complaint" (the affidavit), which was attached to the warrant as a supplemental form. The surveillance team was briefed as to the anticipatory nature of the warrant and what had to happen before they could legally enter the house. The warrant and attached affidavit were taken to the scene of the search. An undercover officer delivered the package to the front door. Defendant's girlfriend answered the door and accepted the package, but left it on the front porch. The surveillance team could not see the package because a van was parked in defendant's driveway, interrupting their line of sight. The defendant's girlfriend soon drove off in the van revealing that the package was no longer on the porch. The transmitter in the package went off at that point. The girlfriend was stopped nearby and found to not have the package with her. Surmising that the package must have been taken into the house, the agents approached the house. Defendant was arrested when he saw them coming and attempted to escape. The opened package was found during the execution of the search warrant in the house, along with more PCP, crack cocaine and marijuana. Defendant eventually pled guilty to conspiracy to distribute PCP (21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846). He appealed, challenging the validity of the anticipatory search warrant itself, as well as its execution.

HELD: The Ninth Circuit Court of Appeal affirmed. As to the validity of the anticipatory search warrant, it is a rule of law that the "conditions precedent" (i.e., what must happen before execution of the warrant is authorized) must appear on the face of the warrant itself (i.e., the court order, signed by the judge, authorizing the search of a particular place for particularly described property), and not just in the affidavit. This is because it is the warrant itself that (1) limits the discretion of the searching officers and (2) informs the property owner or resident of the proper authorized scope of the search. Alternatively, it is legally sufficient if the affidavit setting forth the conditions precedent (triggering events) accompanies the search warrant at all relevant times prior to and during the search and the warrant adequately incorporates the accompanying affidavit. Here, the warrant explicitly stated on its face; "Upon the sworn complaint (i.e., the affidavit) made before me there is probable cause to believe. . . ." The state practice in Washington State, apparently, is to attach the affidavit, referred to as the "sworn complaint," to the search warrant, and the

warrant and "sworn complaint" are then considered to be one document. Therefore, because the affidavit is itself a part of the warrant, it was sufficiently incorporated under the facts of this case. Defendant then argued that one of the conditions precedent to executing the warrant was not complied with; i.e., observation of the package being taken into the residence. The Court found that "observing it" did not necessarily mean that they had to actually see it disappear into the house. "To observe" also means "to come to realize or know especially through consideration of noted fact." Having earlier seen the package on the porch, not finding it in the only other place it could have been (the girlfriend's van), and noting the transmitter when it went off, the agents could logically conclude that it had to have been taken into the house. That was sufficient to meet this condition precedent to executing the warrant.

NOTE: All this stuff about the warrant affidavit having to accompany the warrant to the scene of the search when the affidavit is the only document describing the conditions precedent to the execution of an anticipatory warrant may not be state law. This is because under California authority, you don't even have to show the defendant, or leave at the scene, a copy of the warrant. (See People v. Calabrese (2002) 101 Cal.App.4th 79; and P.C. § 1535.) There is even state authority for the argument that failure to describe the conditions precedent on the warrant, or incorporate them from the affidavit, is not necessarily fatal to the validity of an anticipatory search warrant. (People v. Sousa (1993) 18 Cal.App.4th 549, 561.) But the whole issue goes away if you just remember to include on the face of an anticipatory warrant something to the effect that: "THIS WARRANT CAN BE SERVED ONLY UPON (describing the conditions precedent)," with a place for the magistrate to initial. Then, everyone's happy and you're covered should your case end up in federal court, where they consider it a Fourth Amendment violation to fail to do this. Also, important to remember is that the courts will use common sense appraisal of the evidence and reject the defendant's hypertechnical arguments like those Vesikuru made over the meaning of the word "observed."

NOTES:

People v. Gotfried

(2003) 107 Cal.App.4th 254

SUBJECT: Search of Residence; Thermal Imaging Device

RULE: Use of a thermal imaging device requires a search warrant supported by probable cause.

FACTS: Monterey County Deputy Ruben Garcia learned from an anonymous informant that defendant was growing between 80 to 120 marijuana plants in his residential trailer in a rural area. The informant provided certain specifics, such as where in the trailer defendant was growing the marijuana, how much he sold it for, and how he managed to divert electricity for three years without being detected. The informant further told Deputy Garcia that defendant was being evicted and would soon be moving his operation elsewhere. The informant described in detail two vehicles defendant drove, including the make and license numbers of each. A DMV check revealed that the two vehicles were in fact registered to defendant, but at a different address. Deputy Garcia drove to the area in an unmarked vehicle and observed defendant driving one of the described vehicles. The other vehicle was seen parked at the trailer. Defendant confronted Deputy Garcia, asking him why he was in the area. The deputy made up an excuse, and defendant told him to leave. Based upon this information, Deputy Garcia sought a search warrant authorizing the use of a "thermal imaging device" to detect the heat emanating from defendant's trailer, hoping to corroborate the presence of an indoor marijuana grow. The magistrate approved the warrant. The thermal imaging device detected a large amount of heat from the rear and side of defendant's trailer; scans of neighboring homes radiated none. Deputy Garcia took this information and sought a new search warrant to search defendant's trailer. Execution of this second warrant resulted in the recovery of 109 live, growing marijuana plants. Charged with cultivation of marijuana, defendant brought a motion to suppress the evidence at his preliminary examination, arguing that the first warrant, seeking authorization to use a thermal imagining device, was issued without probable cause and therefore illegal. Defendant further argued that the use of the illegally obtained information concerning heat emanating from his trailer in the second warrant made that warrant illegal as well. The preliminary hearing judge denied defendant's motion, finding that probable cause supported issuance of the first warrant. Upon review in the Superior Court, the trial judge found that the thermal imaging device warrant was issued *without* probable cause, but that because the deputy acted reasonably, the warrant was lawful anyway.

HELD: The court of appeal reversed, finding that a warrant authorizing the use of a thermal imaging device on less than probable cause, being contrary to the specific language of the Fourth Amendment, is illegal. The law is well-settled that anonymous information, without corroboration, is legally insufficient to establish probable cause. The only corroboration obtained by the deputy was of facts that were readily observable by anyone, such as the suspect's physical description and that of his vehicles, failing to reflect any sort of inside information. Corroboration by such "*pedestrian facts*" adds little if anything to the informant's otherwise uncorroborated information. Defendant asking Deputy Garcia to leave the area does not necessarily mean that defendant was doing anything illegal. As such, there was insufficient probable cause for issuance of the first warrant, as is required by the Fourth Amendment. And there is no authority for the proposition that a search warrant can be issued on less than probable cause, even when only seeking to verify or corroborate other information, and even though defendant's house was not to be physically entered. Lastly, the Court found that the deputy's "*good faith*" did not save the thermal imaging device warrant. Both the California Supreme Court (*People v. Deutsch* (1996) 44 Cal.App.4th 1224) and,

since this search, the United States Supreme Court (*Kyllo v. United States* (2001) 553 U.S. 27) have ruled that use of an instrument "that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion," is a search and requires judicial authorization by a search warrant supported by probable cause. Any reasonable law enforcement officer should know this rule.

NOTE: The informant provided a large number of specific and detailed facts related to defendant's criminal activity, which constituted more information and more detailed information than many informants. However, none of this information was corroborated by the deputy prior to obtaining the search warrant.

NOTES:

People v. Thuss

(2003) 107 Cal.App.4th 221

SUBJECT: Search Warrants; Probable Cause

RULE: Freshly cut marijuana stems and leaves found in a trash can establishes the required probable cause necessary to obtain a search warrant for the residence.

FACTS: A deputy executed a search warrant on defendant's home, recovering 47 marijuana plants from hydroponic grow trays in a bedroom. The search warrant was based on the recovery of recently cut marijuana stems and leaves from defendant's trash can, put out at the curb for collection, and the results of a check with the Sacramento Municipal Utility District (SMUD) indicating a nine-month usage of electricity which was about 143 to 252 percent higher than that of his neighbors. In the deputy's expert opinion, this was consistent with the use of equipment needed to grow marijuana indoors, such as grow bulbs, ballasts, fans, and water pumps. Charged with cultivating marijuana, defendant brought a motion to traverse the warrant and suppress the evidence, arguing that the deputy had fabricated much of what was in the warrant affidavit, including the finding of the marijuana clippings in his trash and the information obtained from SMUD. After a hearing, the trial judge indicated that he was "confused about the SMUD thing" and redacted that information from the affidavit. However, he found the deputy's claims that he found marijuana clippings in defendant's trash can to be credible, and that that information alone was sufficient to establish probable cause. Defendant's motion to suppress was denied.

HELD: The court of appeal affirmed. It held that the finding of recently cut marijuana stems and leaves in the defendant's trash met the probable cause standard by establishing a "*fair probability*" that a search would uncover criminal wrongdoing. In so finding, the court differentiated the facts of this case from those of a prior case that found that a personal amount of drugs in a vehicle, a distance from the defendant's home, *is not* probable cause to search the home. (*People v. Pressey* (2002) 102 Cal.App. 1178.) It also noted that, since "*certainty*" is not required to support a search warrant, the *possibility* that someone else might have tossed those clippings into defendant's trashcan does not mean there was insufficient probable cause for the warrant.

NOTE: Although the trial judge did not state his reasons for redacting the electricity usage information from the warrant affidavit, it might have been because the defense conducted an intense attack on the credibility of the deputy. The defendant accused the deputy of fabricating the results of various parts of his investigation, including the information regarding electricity usage. He called numerous witnesses to establish that the deputy had a pattern of including similar misrepresentations in other search warrant affidavits. Some of these allegations were supported by the deputy's admissions that he had made "mistakes." The judge's redaction of the evidence emphasizes the importance of being careful *not* to make mistakes in the collection and reporting of evidence, whether put into a report or a search warrant affidavit.

NOTES:

People v. Sanders et al.

(2003) 31 Cal.4th 318

SUBJECT: Parole Clause Searches

RULE: An otherwise illegal search of a residence cannot later be upheld by the belated discovery that an adult occupant of the residence has a parole search clause.

FACTS: The two defendants in this case are a husband (McDaniel) and wife (Sanders). Two police officers came to the defendants' apartment after speaking to a building manager who indicated that there was a fight going on in the apartment. As the officers approached the apartment, one of them heard a man and woman inside yelling at each other. The other officer knocked on the door. The yelling stopped and, a short time later, Sanders peeked out through some blinds. The officer knocked again and ordered the occupants to open the door. After a short delay, Sanders opened the door. She had an abrasion on her face. McDaniel was nearby, standing behind a couch. The officers entered the apartment. They saw McDaniel place something behind a couch cushion. One officer caught a glimpse of something metal. Sanders demanded that the officers leave and began "tussling" with one of the officers. McDaniel demanded that the officers leave Sanders alone and moved toward the officer tussling with his wife. The officers handcuffed both defendants and conducted a "protective sweep" of the apartment "to make sure there [was] no one else in the residence that could endanger [the officers'] safety." In one of the bedrooms, an officer saw, in plain view, a boot stuffed with chunks of cocaine. After making this discovery and completing the sweep of the apartment, the officer learned McDaniel was on parole and "subject to search terms." The officer then conducted a parole search of the entire apartment. He seized the cocaine he previously had seen in the boot, as well as other items. The other officer recovered a pair of scissors from between the couch cushions. The defendants' motion to suppress the evidence was denied by the trial court. After defendants both pled guilty, they appealed, arguing that the cocaine should have been suppressed. The appellate court agreed and reversed. The Attorney General petitioned the California Supreme Court, which agreed to take the case.

HELD: Although the appellate court had focused much of its discussion on the validity of the protective sweep, when it got before the California Supreme Court, the Attorney General conceded (perhaps wrongly) that the "plain sight observation" of the cocaine was the product of an illegal protective sweep. The issue then became whether the sweep could be justified by the belatedly discovered fact that McDaniel was subject to parole search and seizure conditions. The court found the search was unlawful as to both the non-parolee defendant (Sanders) and the parolee defendant (McDaniel). A nonparolee has a reduced expectation of privacy when she lives with a parolee subject to a search condition, but may still complain about a unlawful search conducted by an officer unaware of her roommate's parole search condition. The parolee has an even more diminished expectation of privacy but "an otherwise unlawful search of the residence of an adult parolee may not be justified by the circumstance that the suspect was subject to a search condition of which the law enforcement officers were unaware when the search was conducted. Since the initial search of the home was conducted by the police before they had knowledge of the parolee's search condition, it was an illegal search. The second search was the tainted fruit of the first search.

NOTE: This holding does not change the rule that if an officer *knows* about a parole search clause in advance, it is not required that the officer conduct the parole search for an investigatory purpose nor

would it be required that the officer have reasonable suspicion to conduct the search. Based on the rationale of *Sanders*, it is likely that evidence seized pursuant to the search of a parolee's person or effects will also be suppressed if the searching officer did not have advance knowledge of the parole search clause and the search is not lawful under a different theory. The court did not opine on whether officers have to know about a *probation* search clause in advance. However, there exist good reasons why an otherwise unlawful search done in the absence of knowledge of a probation clause might be upheld by the California Supreme Court; namely, unlike a parolee who is forced to accept a search clause, a probationer agrees to waive his Fourth Amendment rights. The court did not address the continuing validity of *In re Tyrell J.* (1994) 8 Cal.4th 68, a case upholding the warrantless search of a minor who was on juvenile probation and subject to a search condition of which the police were unaware at the time of the search. Undoubtedly, defendants will challenge the holding of *Tyrell J.* in the future. However, until the courts tell us otherwise, *Tyrell J*. remains good law.

NOTES:

People v. Ledesma

(2003) 106 Cal.App.4th 857

SUBJECT: Protective Sweeps

RULE: The protective sweep doctrine may be properly be applied when conducting a probation search and that sweep can sometimes extend to areas of the house not necessarily occupied by the probationer if there is reason to believe there are other persons in the house who might present a danger.

FACTS: While making a narcotics arrest of a third person, officers came into contact with a known drug user on probation with a search clause. The probationer gave the police her current address, which the officers confirmed with their records division. The officers drove the probationer to that address. The probationer approached the residence and unsuccessfully tried to enter through the front door, which was locked. She then pointed through the front window to a set of keys hanging inside and stated that the keys were probably hers. The officers decided not to enter at that time. The next day the officers returned to the residence to complete the probation search. Two cars were parked in front of the residence and a trailer was parked in the driveway. The defendant (a nonprobationer) answered the door and let the officers into the residence. The defendant appeared to be under the influence of drugs. After the officers told the defendant why they were there, defendant replied that the probationer was not there, did not always stay at the residence, and had not been there in a while. The defendant then escorted the officers to the bedroom used by the probationer when she was there. Before beginning their search of that bedroom, the officer asked defendant if anyone else was in the residence. The defendant replied there was not. An officer then told defendant that he wished to do "a security check for [the officers'] safety" to "make sure nobody was going to sneak up behind [them] while [they] had [their] heads buried in a dresser drawer looking for items within [probationer's] probation terms." The defendant then escorted the officers to his own bedroom. One officer did a visual search of areas where someone might be located. While doing so, the officer noticed defendant slide what appeared to be several bindles of methamphetamine into a dresser drawer. The officer also saw a roll of money on the dresser top and formed the opinion defendant was selling illegal drugs. He asked if the substance defendant had hidden in the drawer was "crank." The defendant said it was. The defendant was then arrested and consented to a search which revealed more illegal drugs and other evidence suggestive of drug trafficking. The defendant made a motion to suppress the drugs. It was denied. Arguing that the recovery of the evidence from his room was the product of an unlawful protective sweep, defendant appealed from his conviction.

HELD: The appellate court upheld defendant's conviction. The Supreme Court in *Maryland v. Buie* (1990) 494 U.S. 325 determined that an officer making an arrest in a residence may also conduct a protective sweep of the residence for other persons in any case where the officer is able to articulate specific facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those at the arrest scene. The standard of proof has been held to be a "*reasonable suspicion*." In this case, even though the officer was not there to arrest the defendant but to do a probation search, the protective sweep was still justified. The officer was familiar with the house and knew other persons to be there on occasion. The probation clause search he wished to conduct was of the room of a person on probation for two drug-related offenses. Defendant himself appeared to be under the influence of drugs. The officer's training and experience led him to believe that "drug users and those who associate with them are apt to have weapons in the house and have transients 'in and out of their house at all times of

the day or night.'" "Firearms are, of course, one of the 'tools of the trade' of the narcotics business." Two vehicles and a trailer were parked out front, indicating the possible presence of other people. The distraction of searching the probationer's room make the officers vulnerable to attack by anyone else who might be in the house. These factors, taken together, were sufficient to cause the officer to reasonably feel concern for their safety, thus justifying the need to insure that no one else in the house constituted a danger to them while they were there. The protective sweep, therefore, was lawful.

NOTE: The court was careful to caution, however, that just because you are conducting a narcotics-related search does not mean that you will automatically have sufficient cause to conduct a protective sweep. You must still be able to point out what is unique about your particular case justifying the sweep. But by the same token, you *do not* necessarily need any *specific* information that some particular person inside the residence is dangerous. In this case, for example, the officer's knowledge (based on his training and experience in narcotics cases) of what typically goes down in drug-houses combined with not much else (i.e., having been there before, two cars and a trailer parked out front, defendant's inebriation, and defendant's drug convictions) provided reasonable cause that whoever else was in the residence could present a threat.

NOTES:

In re William V.

(2003) 111 Cal.App.4th 1464

SUBJECT: School Resource Officers; Authority to Detain and Search; Reasonable Suspicion

RULE: A school resource officer, although employed by a municipal police department, need only meet the reasonable suspicion standard applicable to searches by school officials when he acts in his on-campus capacity.

FACTS: Officer David Johannes is employed by the Hayward Police Department. However, in 2001, he was on a two-year assignment as a "*school resource officer*" at a Hayward high school. In this capacity, Officer Johannes maintained an office on the school campus and worked on the campus eight hours a day. On September 6, 2001, Officer Johannes noticed defendant standing alone in a hallway. Defendant had a red bandanna neatly folded and hanging from the back pocket of his pants. Because such a bandanna was indicative of a gang affiliation, wearing them in school was a violation of the school's rules. Officer Johannes also knew that having it folded in such a manner signified an imminent confrontation and that the school had recently experienced several incidents of gang violence. He therefore made contact with defendant and told him to remove the bandanna. Defendant, who immediately became noticeably nervous, claimed that he did not know it was there. Officer Johannes decided that he was going to take defendant to the principal's office for discipline. Before he did, however, he patted him down for weapons. An object could be felt in his waistband covered by his coat. The officer lifted the coat, observed the handle of a knife, and removed a steak knife with a five-inch serrated metal blade. Defendant admitted a misdemeanor violation of possession of a knife on school grounds (Pen. Code, § 626.10, subd. (a)) after his motion to suppress was denied.

HELD: The court of appeal affirmed. The court first considered the legal standards applicable to a "*school resource officer*" who, although employed by a municipal police department, works on a school campus with school officials. Recognizing that school officials may conduct warrantless searches on no more than a "*reasonable suspicion,*" the court found that the same rules applied to Officer Johannes. Attempting to apply the normal "*probable cause*" standards to a school resource officer merely because of who pays his salary ignores the importance of the governmental interests in maintaining order on school campuses and the officer's purpose in being there. Officer Johannes was therefore lawfully justified in detaining defendant and conducting a search for weapons.

NOTE: The court's conclusion is significant because it applies the lower reasonable suspicion standard versus the probable cause standard for searches by police officers when they are acting as "school resource officers." As an aside, because the search was not a *Terry* pat search for *officer* safety, but rather a generalized search for *school* safety, *Terry* was not addressed in the opinion. (*Terry v. Ohio* (1968) 392 U.S. 1.)

NOTES:

Ganwich v. Knapp

(9th Cir. 2003) 319 F.3d 1115

SUBJECT: Detentions and interrogations during execution of a search warrant

RULE: Detention of the employees of a business during the execution of a search warrant is lawful. Using the detention as a tool to coerce those employees into submitting to an interview *is not* lawful.

FACTS: Pierce County, Washington, law enforcement officers (i.e., defendants in this civil suit) executed a search warrant on the morning of December 23, 1999, at Ear-Tec Hearing Aid Specialists; a business that was under investigation for various fraudulent practices harmful to consumers.

Plaintiffs were employees of the business, as well as four of their children (ages seven to twelve) who were there for an office Christmas party. The defendant police officers gathered the employees into the business's waiting room and announced to them that they were not under arrest, but that they would be held in the waiting room until each could be interviewed by police investigators in a back room. No one was allowed to leave the waiting room, go to the restroom unattended, retrieve personal possessions, or make or receive telephone calls. Plaintiffs were each held from one hour and forty-five minutes to four hours and forty-five minutes, waiting to be interviewed. One plaintiff who declined to be interviewed was detained an additional 2½ hours before being asked again, at which point she agreed, believing it was the only way the officers would let her go. The children were held for 45 minutes before being allowed to leave with one plaintiff's adult daughter.

Allegedly, none of the plaintiffs had any involvement in the company's illegal activities. Plaintiffs later sued the county and two of its officers in federal court under 42 U.S.C. § 1983, alleging a violation of their Fourth Amendment rights. Defendants moved for summary judgment, arguing that they had qualified immunity. They appealed the denial of this motion.

HELD: The Ninth Circuit Court of Appeal affirmed the denial of the defendants' summary judgment motion, sending the case back to the trial court for trial.

An appellate court's evaluation of such an appeal involves two steps: First, assuming everything alleged by the plaintiffs is true; did the officers violate the plaintiffs' constitutional rights? Second, if they did, was it a violation of a right that is "*clearly established*" when viewed in the context of the case?

Detaining a person involves a Fourth Amendment "*seizure*." In determining the legality of any particular "*seizure*," the government's interests must be balanced with the interests of the plaintiffs to be free from *unreasonable* governmental seizures. In other words, did the need to hold the employees for an extended period of time outweigh their right to be protected from *unreasonable seizures*?

Detaining persons in a business during the execution of a search warrant serves several important law enforcement interests: Preventing the fleeing of suspects should incriminating evidence be found;

minimizing the risk of harm to officers; and ensuring that if help is needed to perhaps unlock a door or cabinet, someone is there to do it. Holding plaintiffs in a waiting room was *not*, in itself, a serious invasion of privacy. The detention of the plaintiffs in this case, therefore, was reasonable. However, such a detention must be performed in a *reasonable manner*, "*carefully tailored to the detention's underlying justification*."

Using the continued detention to coerce the plaintiffs into cooperating with the officers' planned interviews did not help advance any of the law enforcement interests listed above. Neither did the refusal to allow plaintiffs to make outside telephone calls. Also, because such a tactic is one that should have been "clear to a reasonable officer that his or her conduct was unlawful," the defendant officers are not entitled to "qualified immunity" from civil liability. The trial court, therefore, properly denied the civil defendants' motion for summary judgment.

NOTE: Remember, this is a civil case. Denial of a summary judgment motion merely means that the issue of civil liability will now have to be decided by a jury. But the law in this case is clear: You can't coerce people into talking to you by using your authority as a police officer. Whether the person is a suspect or merely a witness, he or she is not required to cooperate in an interview. Your proper recourse for an uncooperative witness is to use your detention authority (if any under the circumstances) to identify him, and then let him go. If you believe he has relevant information, he can be subpoenaed and forced by a grand jury or trial court to answer questions under threat of a contempt citation. But you, as an investigating officer, can not condition a person's freedom on their level of cooperation in an interview (where you don't have probable cause to arrest).

NOTES:

In re James B.

(2003) 109 Cal.App.4th 862

SUBJECT: Vehicle (auto) Burglary

RULE: A vehicle with locked doors, but windows rolled down three to four inches for purposes of ventilation, can be the subject of a vehicle burglary (459 P.C.).

FACTS: On April 30, 2002, Daniel Goehring parked his Chrysler PT Cruiser in the parking lot of Arrowhead Credit Union. Goehring locked the doors of the vehicle and opened the windows for ventilation. Although he usually opens the windows a couple inches, the driver's window was open about one inch and the passenger window was open about three inches.

Mr. Ruben Morales was in the parking lot at an ATM machine. Mr. Morales saw minor close the door of Goehring's vehicle and walk away. He called the police after he saw minor return to the vehicle and open the door.

Deputy Sheriff Cory Emon responded and arrested minor at the scene. The passenger window of Goehring's vehicle was down three to four inches, but Deputy Emon could not reach his hand through the opening. The minor was advised of his Miranda rights and waived them. The minor told Deputy Emon that he had reached through the window opening, unlocked the door, and took a cell phone from the interior of the car. The minor also told Deputy Emon that he did not want to lie anymore. Deputy Emon asked the minor where the cell phone was and the minor took the deputy to a bush where minor retrieved the phone.

Deputy Emon asked minor whether he knew the difference between doing what is right and what is wrong. Minor said, "a little bit." When asked for an example of something that is right to do, minor said, "being nice." In response to a request for an example of something that was wrong to do, minor answered, "run from the police." Minor also told the deputy that his parents punish him for doing something they have taught him is wrong.

The minor was declared a ward of the court and placed on probation. Minor filed an appeal and claimed that there was insufficient evidence to convict him of burglary, arguing that the vehicle was not locked within the meaning of Penal Code section 459. Because a window of the vehicle was partially open, minor claims that the vehicle should not be considered locked.

HELD: The Appellate Court noted that Section 459 of the Penal Code defines burglary to include entering a vehicle "when the doors are locked. .. with intent to commit grand or petit larceny. . ." Thus, burglary from a vehicle requires that the doors of a vehicle be locked. Yet, neither forced entry in the usual sense of the word nor use of burglar tools are elements of auto burglary.

The requirement of locking as an element of vehicular burglary has been interpreted to mean "that where a defendant used no pressure, broke no seal, and disengaged no mechanism that could reasonably be

called a lock, he is not guilty of auto burglary. Therefore, because auto burglary can be committed only by entering a locked vehicle without the owner's consent, it is only accomplished by altering the vehicle's physical condition; at worst, by smashing a window, at best, by illegally unlocking it. These extremes, as well as other possible types of forcible entries, necessarily involve unlawfully altering the vehicle's locked state.

In the present case, the vehicle's doors were locked and the windows were left partially open for ventilation. The driver's window was open about an inch and the passenger window was open three to four inches. There was nothing within grabbing distance of the opening in the window. If the minor had merely reached through the window opening and removed the cell phone, without unlocking the door, there would have been no burglary. The facts of this case, however, show that the minor entered a locked vehicle without the owner's consent by illegally unlocking it. The issue is not how far down the window was left, but whether the locked vehicle was entered by illegally unlocking it, thereby unlawfully altering the vehicle's locked state. Thus, the Appellate Court held that the elements of auto burglary were met.

NOTE: Vehicular (auto) burglary requires the unlawful altering of a vehicles locked state.

NOTES:

People v. Rivera

(2003) 109 Cal.App.4th 1241

SUBJECT: Vehicle Burglary; Window Broken

RULE: Evidence of a broken window that was proved to be intact hours earlier is sufficient to prove that the vehicle was locked for purposes of the vehicle burglary statute.

FACTS: An officer responded to a report of a vehicle being broken into at about 1:00 a.m. He saw defendant and another suspect sitting in a parked car with a window broken and its interior in disarray. As the officer approached, defendant threw some papers and a screwdriver and fled. He was arrested nearby. At trial, the victim of the vehicle burglary was not available, but a friend testified that she had been with the victim six or eight hours earlier and that the window was not broken at that time. Defendant was convicted of vehicle burglary and appealed, arguing that there was insufficient evidence to show that the vehicle had been locked at the time, a necessary element of vehicle burglary.

HELD: The court of appeal upheld the conviction. Although the victim in this case did not testify, there was evidence that the window was not broken some six to eight hours earlier. "It is not rational to conclude someone would break a car window in the early morning hours in order to enter a car that is unlocked." Circumstantially, therefore, the elements of a vehicle burglary were sufficiently proved to sustain the conviction.

NOTE: On its face, this case looks like a "*slam dunk*" because the officer caught defendant "*red handed*" in the car. In such a case, an officer may be tempted to quit collecting evidence, believing that there is no way any competent prosecutor could lose it. However, the unpredictability of any particular jury panel coupled with the possibility (which was realized in this case) that various witnesses may be unavailable at trial demonstrates that *there is no such thing as a* "*slam dunk*" when it comes to criminal prosecutions.

NOTES:

Manriquez v. Gourley

(2003) 105 Cal.App.4th 1227

SUBJECT: DUI Test, Continuous Observation

RULE: The 15 minutes of "continuous observation" required before a breath test may be administered does not mean there must be direct, unbroken eye-contact.

FACTS: On the basis of defendant Manriquez' driving, his failure to pass field sobriety tests, and other indications of intoxication, a CHP officer arrested him for DUI on Interstate 5 near San Diego shortly after midnight. After releasing Manriquez' vehicle to a tow-truck operator, the officer transported him to the San Diego jail where two breath tests each showed a blood-alcohol level of 0.11. The officer then issued an order suspending Manriquez driver's license. Manriquez thereafter requested an administrative hearing at which the primary issue became whether the officer had complied with the regulation which requires, in relevant part, that a breath sample be collected "only after the subject has been under *continuous observation* for at least fifteen minutes prior to collection . . . ." (Cal. Code Regs., tit. 17, sec. 1219.3; emphasis added.) The officer testified that after releasing Manriquez' vehicle to the tow-truck driver at 12:35 a.m., 16 minutes expired as he drove Manriquez to the San Diego jail where the first breath test was administered at 12:51 a.m. The officer explained that during this interval, he was talking to Manriquez and looking at him in his rear-view mirror, and that Manriquez did not eat, drink, smoke or vomit while in the patrol car. In addition, the officer testified that before administering the breath test, he asked Manriquez if he had burped anytime during the previous 20 minutes, and that Manriquez replied he had not. Testifying for the defense, a former deputy sheriff claimed that it was "impossible" for an officer driving a vehicle to continuously observe someone seated in the vehicle's backseat, particularly when that person was located, as Manriquez had been, on the right side; and that in order to properly comply with the regulation, he (the former sheriff) would have observed Manriquez for an additional 15-minute period after arriving at the jail. The hearing officer rejected this defense and reimposed the license suspension. Manriquez petitioned the superior court, which reversed the administrative decision and found that indeed it would have been impossible for the officer to have complied with regulation's "continuous observation" requirement. DMV then appealed to the Court of Appeal.

HELD: The Court of Appeal ruled in favor of DMV and reinstated the suspension. Noting that the burden of proof at a DMV administrative hearing requires only a "preponderance" of evidence (rather than proof "beyond a reasonable doubt," as is required for criminal trials), and further that there is a legal "presumption" the officer complied with applicable regulations, the Court found that the term "continuous observation" in regulation 1219.3 does *not* require an officer to maintain direct and unbroken eye-contact with the test-subject for 15 minutes prior to the breath test; that "observation" includes perception by senses other than sight; and that the purpose of the regulation was fulfilled by such an interpretation: "(W)e hold that continuous observation for purposes of compliance with regulation 1219.3 does not mean an officer must keep his or her eyes focused on the subject for an uninterrupted 15-minute period. Observation is not limited to perception by sight; an officer may perceive a subject has eaten, drank [sic],

smoked, vomited or regurgitated by sound or smell[,] and the perception by senses other than sight can be sufficient to comply with the regulation. Further, the regulation should be interpreted with reference to its purpose, which is to determine whether the test subject has smoked, ingested food or drink, or suffered physical symptoms that would adversely affect the test results. . . . In our view, uninterrupted eye contact is not necessary (and may not always be sufficient by itself) to determine whether the proscribed events have occurred, so long as the officer remains present with the subject and able by the use of all his or her senses to make that determination. Our conclusion is consistent with a workable interpretation of the continuous observation rule, and also with the conclusion of other jurisdictions that have addressed this issue under similar regulations." Here, because the CHP officer was in "close physical proximity" with Manriquez and was interacting with him (by talking, listening, and looking at him in the rear-view mirror), there was compliance with the "continuous observation" requirement of regulation 1219.3. "[T]he use of all of the officer's senses enabled him to assure compliance with the continuous observation requirement."

NOTE: Concerning the officer's question to Manriquez about whether he had "burped" during the previous 20 minutes, the Court noted that while it was "perhaps helpful, [it] was not necessary to establish compliance with the regulation." Put another way, there was no single fact or detail that made the DMV's case. Rather, compliance with the regulation was established by the overall circumstance that the officer had sufficiently close contact with Manriquez—by looking at him, talking to him, listening to him, and being near enough to hear and smell whatever might have occurred—to ensure that he had not smoked, eaten or drunk anything, or regurgitated or vomited for 15 minutes prior to the breath test: "In reaching our conclusion, we emphasize we do not intend to pronounce the manner of observation that will satisfy regulation 1219.3 in all cases; we simply hold that continuous observation within the meaning of the rule does not require direct and unbroken eye contact for the 15-minute period as long as other means of uninterrupted observation are adequate."

NOTES:

People v. Ormiston

(2003) 105 Cal.App.4th 676

SUBJECT: Transportation of Drugs

RULE: "Walking" can qualify as a mode of transportation for purposes of the drug transportation laws.

FACTS: Defendant was manufacturing methamphetamine in his hotel room. When the police arrived at his hotel, defendant was observed walking southbound away from the hotel in the parking lot. Defendant was legally stopped and arrested. Three baggies of "wet" methamphetamine powder in quantities generally possessed for more than just personal use, a hypodermic syringe, and a digital scale were found in defendant's jacket pocket. Defendant did not contest the arrest or search. An expert offered the opinion that the "wet" methamphetamine had been recently produced within the past couple of hours. Defendant was convicted of transporting methamphetamine (11379 H&S) and a variety of other offenses. Defendant claimed that there was no evidence to support his conviction for transportation of methamphetamine.

HELD: The Appellate Court noted that Health & Safety Code Section 11379 provides that "every person who transports.. .any controlled substance... shall be punished by imprisonment in the state prison for a period of two, three, or four years." Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. Movement of the contraband from one place to another is required.

The evidence indisputably establishes the movement of methamphetamine by defendant from one place to another. After a methamphetamine processing enterprise was discovered in a hotel room jointly occupied by defendant, later the same day he was arrested while "walking southbound away from the hotel" with three baggies of "recently manufactured" methamphetamine powder in his jacket pocket.

Defendant's use of foot travel, rather than some other means of conveyance, to take the methamphetamine to whatever destination he intended to reach, does not negate the element of transportation. Section 11379 neither mentions nor excludes from its scope any particular means of transportation. A violation of the statute requires movement of the controlled substance to another location, but not the use of a mechanized or motorized means of delivery. The statute is intended to inhibit the trafficking and proliferation of controlled substances by deterring their movement. Walking may not be the most efficient or expeditious means available for long distance transportation of controlled substances, but it is often the most feasible way to complete deliveries to locations in close geographic proximity,

In summary, The Appellate Court held that the term "transport" in H&S Section 11379 includes moving controlled substances from one place to another by walking. The conviction was upheld.

NOTE: This is the first case to recognize "walking" as a mode of transportation that can qualify for drug transportation penalties.

NOTES:

In re Johnny O.

(2003) 107 Cal.App.4th 888

SUBJECT: Possession of marijuana bong/pipe

RULE: Marijuana bong/pipe does not qualify as an H&S 11364 violation.

FACTS: On November 26, 2001, probation officers carried out a probation search of defendant's bedroom. They found two bongs, one made out of glass, and one jury-rigged from a shampoo bottle. Defendant admitted using the bongs to smoke marijuana. Each bong contained a residue which later tested positive for cannabinoids. Cannabinoids are compounds containing tetrahydrocannabinol (THC). THC is the psychoactive ingredient in marijuana.

HELD: Health and Safety Code section 11364 provides: "It is unlawful to possess an opium pipe or any device, contrivance, instrument, or paraphernalia used for unlawfully injecting or smoking a controlled substance specified in:

11054(b) H&S	Opiates
11054(c) H&S	Opium Derivatives
11054(e) H&S	Mecloqualone, Methaqualone, GHB
11054(f)(1) H&S	Cocaine Base
11054(d)U4) H&S	Mescaline
11054(d)(15) H&S	Peyote
11054(d)(20) H&S	Tetrahydrocannabinols (THC) - Synthetic equivalents of marijuana
11055(b) H&S	Opiates
11O55(c) H&S	Opiates
11055(d)(2) H&S	Methamphetamine

- or a controlled substance which is a narcotic drug classified in Schedule 3, 4, or 5.

The Appellate Court noted that marijuana is a Schedule 1 controlled substance and is scheduled under 11054(d)(13) H&S, however, it is not listed as a qualifying controlled substance under 11364 H&S. Additionally, the Legislature criminalized the illegal possession of instruments used to inject or smoke synthetic equivalents of marijuana (11054(d)(20) H&S), nevertheless, possession of a device to smoke (natural) marijuana is not a crime in California.

NOTE: This decision does not impact H&S 11364.5 or H&S 11364.7.

* A minor, under the age of 18 years, who is in possession of a marijuana bong or pipe could be charged with the following infraction violation:

308(b) P.C. - Every person under the age of 18 years who purchases, receives, or possesses any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking of tobacco, products prepared from tobacco, or any controlled substance shall, upon conviction, be punished by a fine of seventy-five dollars ($75) or 30 hours of community service work.

NOTES:

In re John Z.

(2003) 29 Cal.4th 756

SUBJECT: Rape; Withdrawal of Consent

RULE: Forcible intercourse is still rape even if the victim initially consents to the intercourse.

FACTS: Juan G. called 17-year-old Laura T and asked her to drive him to a party at defendant's house. At the party, defendant and Juan began to pressure Laura into submitting to sexual intercourse. Laura told them she wasn't interested. Taking her into a bedroom, both boys began with foreplay by removing her clothes and getting touchy-feely with her even though Laura told them not to. Laura later testified that she actually enjoyed this, at least until Juan took his clothes off and put on a condom. Defendant left the room while Juan got on top of a resisting Laura, forcing intercourse with her until, due to her lack of cooperation, the condom fell off. Juan gave up and left the room. Defendant then reentered the room and took his clothes off. He laid down next to a still-unclothed Laura and they kissed until defendant eventually rolled over onto her and penetrated her with his penis. Laura then began to resist but defendant kept telling her to give him just "one more minute." When he finally finished (after about *ten* of those "*one more minute*(*s*)!"), defendant helped Laura get dressed and she left. Charged in Juvenile Court with forcible rape (per P.C. § 261(a)(2)), defendant argued that Laura had consented. The Court sustained the petition and defendant appealed. The appellate court upheld the Juvenile Court ruling and defendant petitioned the California Supreme Court.

HELD: The crime of forcible rape (Pen.Code, § 261(a)(2)) is committed if the female victim consents to an initial penetration by her male companion, and then withdraws her consent during an act of intercourse, but the male continues against her will. A withdrawal of consent effectively nullifies any earlier consent and subjects the male to rape charges if the withdrawal is communicated to the male and he forcibly persists in what has become nonconsensual intercourse. The court rejected the argument that where a victim initially consents to intercourse, the defendant should be permitted a "reasonable amount of time" in which to withdraw after the victim raises an objection to further intercourse.

NOTE: The court noted that it was questionable whether the victim had ever really consented to sexual intercourse in the first place. The court made note of Penal Code § 261.6 which defines the type of consent at issue under § 261.6 as: "positive cooperation in act or attitude pursuant to an exercise of free will. However, in deciding the case, the court assumed, for the sake of the argument, that the victim had, at least initially, consented. Regardless, it is now clear under the law that when a woman says "*no*," she means "*no*," and it matters not when in the sequence of events she expresses that "*no*."

NOTES:

In re L.T.

(2002) 103 Cal.App.4th 262

SUBJECT: Arson; Burning Personal Property

RULE: The intentional burning of trash which does not belong to the one who set it on fire is an arson pursuant to Penal Code section 451, subdivision (d).

FACTS: Defendant was observed on school grounds using a cigarette lighter to set on fire discarded cardboard in a trash can. Defendant was charged in a Juvenile Court petition with arson of "*property*," pursuant to Penal Code section 451, subdivision (d). The defense attorney argued that the defendant could not be guilty of burning "property" by burning trash. The prosecutor argued that the trash was the property of the middle school. Agreeing with the prosecution, the court sustained the petition.

HELD: The court of appeal upheld the trial court's ruling. However, it did so not on the theory that it was the school's property that was burned, but rather that it was *not* the defendant's property. Penal Code section 451, subdivision (d), makes it a felony to burn "*property*." "*Property*" is defined as "*real or personal property, other than a structure or forest land.*" (Pen. Code, § 450, subd. (c).) Section 451, subdivision (d), specifically excludes from criminal liability the burning of one's own "*personal property*" (unless there is an intent to defraud or unless there is an injury to another person or another person's structure, forest land or property). "*Property*" is anything that is subject to ownership. Trash is a " thing" that is subject to ownership (Civ. Code, §§ 654, 655), whether or not it was actually owned by someone. The statute requires only that the trash defendant burned was not her own personal property.

NOTE: The main issue in this case was whether trash could be defined as "property" for purposes of the arson statute at issue. The issue had to be clarified because trash is generally not considered property for many theft offenses (People v. Kozlowski (2002) 96 Cal.App.4th 853; Pen. Code, § 484) and is not protected from unreasonable searches and seizures under the Fourth Amendment (California v. Greenwood (1988) 486 U.S. 351).

NOTES:

People v. Stanistreet

(2003) 29 Cal.4th 497

SUBJECT: Citizen Complaints; Filing a False Allegation of Police Misconduct

RULE: P.C. § 148.6, making it a misdemeanor to knowingly file a false citizen's complaint on a peace officer, is constitutional.

FACTS: Defendants Shaun Stanistreet and Barbara Joyce Atkinson accused an Oxnard police officer of committing a lewd act at a Police Activities League gathering. An investigation into the accusation resulted in a finding that the charges were false. The two defendants were charged with filing a false report of a criminal offense, per P.C. § 148.5, and falsely alleging police misconduct, per P.C. § 148.6. A jury convicted the defendants of both counts and they appealed. The Second District Court of Appeal reversed, finding that P.C. § 148.5, filing a false report of a crime, did not apply to complaints of police misconduct. The Appellate Court also found that P.C. § 148.6, which purports to make it a misdemeanor to file a false citizen's complaint on a peace officer, was a constitutional violation of the complainer's First Amendment freedom of expression. Conceding the P.C. § 148.5 ruling, the People sought review of the Court's decision on the section 148.6 charge.

HELD: The California Supreme Court reversed. Due to a number of prior cases interpreting P.C. 148.5 (false report of a crime) as not applying to complaints of police misconduct from members of the public, the Legislature enacted P.C. § 148.6 to fill the gap. The fact that it makes it a crime to file a false report of misconduct against a peace officer, without protecting other professional categories as well (e.g., firefighters, EMTs, etc.), does not make the section unconstitutional. This is because law enforcement officers suffer some career-inhibiting disadvantages stemming from citizen's complaints that other professional groups don't, for instance: they must, by law, be investigated, retained for at least five years, even if found to be unfounded and they can be used as evidence to impeach an officer's credibility in future, unrelated cases. While the right to criticize government and governmental officials is among the more important rights Americans enjoy, protected by the First Amendment, this does not include the right to purposely make knowingly false accusations. There is no constitutional right to make a knowingly false statement or to make a statement with a reckless disregard for the truth. Applying the standards for protecting speech under the First Amendment, as dictated by the United States Supreme Court, it was also determined that contrary to the defendants' and the Appellate Court's conclusions, knowingly false citizen complaints was not the type of speech intended to be protected. Defendants, therefore, were properly convicted of P.C. § 148.6.

NOTE: This was a unanimous decision. The section prohibits formally filed accusations that the agency must investigate, not casual speech. The accusation must be made knowing that it is false. False accusations knowingly made are not protected by the First Amendment of the US Constitution and, according to the court, punishing those who would make such false accusations would have no more of an "impermissible chilling effect" then punishing those who commit perjury.

NOTES:

Stogner v. California

(2003) 123 S.Ct. 2446

SUBJECT: Statute of Limitations in Sex Cases, per P.C. § 803(g)

RULE: The attempted revival of sex offense prosecutions under section 803(g) where the statute of limitations had expired before 1/1/94 is a violation of the constitution's ex post facto clause.

FACTS: The defendant committed several crimes involving sex-related child abuse between 1955 and 1973. The statute of limitations in effect *at that time* expired three years after the last event. In 1993, however, the California Legislature enacted P.C. § 803(g) (effective 1/1/94), providing an exception to the six-year limitation of section 800 (and 3-year limitation of § 801) for certain listed sex offenses, including felony child molest per P.C. § 288 where (1) a victim has reported an allegation of abuse to the police, (2) there is independent evidence that clearly and convincingly corroborates the victim's allegation, and (3) the prosecution is begun within one year of the victim's report. In 1998, the defendant was indicted and charged with the earlier sex crimes pursuant to Penal Code section 803(g). The defendant argued charging him so late in the game violated the ex post facto clause of the constitution. The United States Supreme Court eventually took up the case.

HELD: The United States Supreme Court, in a 5-to-4 decision, reversed, finding P.C. § 803(g), when used to revive a criminal charge for which the statute of limitations had expired prior to January 1, 1994 (the effective date of P.C. § 803(g)), to be a statute that violates the *ex post facto* clause of the Constitution.

NOTE: So what does this mean for your pending sex (P.C. §§ 261, 286, 288, 288a, 288.5, 289, & 289.5) investigations or prosecutions? If the statute of limitations in effect (three years for offenses occurring before 1/1/85; six years on or after this date) at the time of the alleged offense expired prior to January 1, 1994, your case is no good. He's going to walk. However, for any offense for which the statute of limitations *had not* expired by 1/1/94, the 803(g) extension will save it, so long as the other proof requirements listed in the statute are met. This holding in Stogner will also bar application of P.C. § 803(f) (victim under 18 years; effective 1/1/90), and P.C. §803(h) (victim under 21 years; effective 1/1/02), where the statute of limitations has expired prior to the section's effective date.

Refer to the following table:

Pen. Code Section	Effective as of:	Crime had 3 year SOL when committed	Crime had 6 year SOL when committed

803(f)	January 1, 1990	Can't use if crime committed before January 1, 1987	Can't use if crime committed before January 1, 1984
803(g)	January 1, 1994	Can't use if crime committed before January 1, 1991	Can't use if crime committed before January 1, 1988
803(h)	January 1, 2002	Can't use if crime committed before January 1, 1999	Can't use if crime committed before January 1, 1996

NOTES: